Supreme Court, U.S.
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In the

Supreme Court of the United States

MICHAEL PITTS and CHARLES LAWSON,

Petitioner,

v.

CITY OF KANKAKEE, an Illinois Municipal Corporation; DONALD E. GREEN, Individually and as Agent of the City of Kankakee, and CHRISTOPHER BOHLEN, Individually and as Agent of the City of Kankakee,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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60 pp

QUESTIONS PRESENTED

I. Is a person's right to sue under 42 U.S.C. §1983 for a non-religious sign two and one-half (2-1/2) years after it was erected when the sign remained continuously until sometime after he filed suit, erected in violation of his rights under the "Free Speech Clause" of the First Amendment entitled to the same Constitutional protection as a person who sues twenty-seven (27) years a religious sign was erected and remained standing continuously until after the filing of the lawsuit under the "Establishment Clause" of the First Amendment?

II. Do the same standards apply to continuing violations of a person's First and Fourteenth Amendment Constitutional rights and employment discrimination cases in determining when the statute of limitations begins or is tolled?

III. Is a "fresh act" violating a person's First or Fourteenth Amendment Constitutional rights and a "fresh act" in an employment discrimination action regarding what constitutes "deliberate indifference" and failure to undo a discriminatory act subject to the same criteria in determining when the statute of limitations begins or is tolled?

IV. Whether the refusal of the Defendants to obey a Resolution of the Kankakee City Council ordering the removal of Plaintiff Michael Pitts' "slum sign" in August, 1999 and the subsequent deliberate failure of the Defendants to follow their "slum sign" policy by either removing the sign identifying Plaintiff Charles Lawson as owning slum property after Lawson sold the property in October, 1999 or because there had been no change in the condition of Lawson's property since the erection of the "slum sign" in not erecting a "slum sign" with the new owner's name on the property constituted "fresh acts" of retaliation under 42 U.S.C. §1983 for purposes of determining whether Plaintiffs' Complaint was barred by the statute of limitations.

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1. The opinion and order denying the Petitioners' Petition for Rehearing En Banc is set forth in the Appendix attached hereto (App. 18a).

2. The opinion of the United States Court of Appeals for the 7th Circuit, Pitts v. City of Kankakee, 267 F.3d 592 (2001), is set forth in the Appendix hereto (App. 1a-7a).

3. The Report and Recommendation of the Magistrate recommending the dismissal of the Plaintiffs' Complaint is set forth in the Appendix attached hereto (App. 10a-17a).

4. The opinion and order of the United States District Court dismissing the Petitioners' Amended Complaint with prejudice is set forth the Appendix attached hereto (App. 8a-9a).

JURISDICTION

The decision sought to be reviewed was entered by the United States Court of Appeals for the 7th Circuit on September 24, 2001. The Order of the Court of Appeals for the 7th Circuit denying Plaintiffs' (Petitioners) Petition for Rehearing En Banc was entered October 18, 2001. The basis for Federal jurisdiction in the Court of first instance (the United States District Court for the Central District of Illinois-Urbana/Danville Division) was contained in the Amended Complaint alleging that various acts and omissions on the part of the Defendants from June, 1997 through and after the filing of their Complaint were acts and omissions done against the Plaintiffs in retaliation for the exercise of their First Amendment rights. The Federal question upon which the Amended Complaint was based is 42 U.S.C. §1983 and §1988 and 28 U.S.C. §1331 and 28 U.S.C. §1343.

The United States Court of Appeals for the 7th Circuit had jurisdiction pursuant to the final order and judgment of the United States District Court entered October 16, 2000. Plaintiffs' Notice of Appeal was timely filed on November 2, 2000 and the United States Court of Appeals for the 7th Circuit had jurisdiction from the District Court's final order and judgment pursuant to 28 U.S.C. §1291. This Petition for Writ of Certiorari is filed within ninety (90) days from the 7th Circuit Court of Appeal's order denying Petitioners' Petition for Rehearing en banc, 28 U.S.C. §2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. §1254(1).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV:

> .....No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Civil Rights Act–42 U.S.C. Section 1983:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State

> or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.....

STATEMENT OF THE CASE

Michael Pitts and Charles Lawson (Petitioners) filed a Complaint on November 18, 1999 in the United States District Court for the Central District of Illinois, Urbana/Danville Division alleging in their Complaint and Amended Complaint filed April 27, 2000 that they were retaliated against by the Defendants for exercising their First Amendment rights by publicly opposing various programs and policies of the Defendants when the Defendants erected a sign on property owned by Lawson describing as the owner of "slum property" in June, 1997 and erected a sign on other properties identifying Michael Pitts as the owner "slum property" when Pitts did not own either of those properties.

The Plaintiffs were the President and Vice-President of the Kankakee Landlords Association and had publicly opposed and criticized the Defendants regarding City of Kankakee's landlords' licensing ordinance; the policy of the Defendants of illegally suing landlords personally for their tenants' municipal utility charges; the illegal actions of employees of the City's Code Enforcement Department directed at landlords; and finally the decision of the Defendants Donald Green and Christopher Bohlen to place "slum property" signs on certain rental properties within the City of Kankakee.

Sometime prior to June, 1997 Defendants Green and Bohlen, without the approval of the Kankakee City Council or authority under Illinois law or Kankakee ordinance

developed a plan to place 3' x 5' signs on the property of people who owned rental properties within the City of Kankakee. Green stated the signs would list the property owners name, address and home telephone number and state that the owner was in violation of the City Code.

In June, 1997 the Defendants placed signs identifying Michael Pitts as the owner of "slum properties" located at 319 S. Albert and 921 E. Merchant Street when in fact Pitts was never the owner of either of those properties.

On August 16, 1999 the Kankakee City Council voted and ordered the removal of the sign identifying Plaintiff Pitts as the owner of slum property located at 319 S. Albert Ave. at a regular meeting of the Kankakee City Council. The Defendants refused to comply with the Resolution of the Kankakee City Council and the 319 S. Albert Ave. "slum sign" property remained on said property continuously from June, 1997 to April 7, 2000.

The Defendants also, in June, 1997, placed a "slum sign" on property then owned by Charles Lawson at 442 S. Chicago Ave. within the City of Kankakee. Lawson conveyed the 442 S. Chicago Avenue property on October 27, 1999 to Neighborhood Partners of Kankakee, Illinois. Neighborhood Partners of Kankakee, Inc.'s Board of Directors authorized the purchase of the property some months before. At that time, and at the time of the sale, the Board of Directors of Neighborhood Partners of Kankakee, Inc. contained among its members, Michael Kinkade, a City of Kankakee police officer; Joanne Schwade, the alderperson for the 2nd Ward of the City of Kankakee (within which Ward 442 S. Chicago Ave. is located); and Jan Bond, head of the City of Kankakee Code Enforcement Department.

The Defendants, with full knowledge of the fact that Plaintiff Lawson no longer owned the property and knowing that there had been no change in the condition of the property since the ""slum sign"" was first erected in June, 1997, did not remove the Lawson "slum sign" nor did they

place a new ""slum sign"" on the property at any time after October 27, 1999 identifying Neighborhood Partners of Kankakee, Inc. as the owner of slum property, in violation of the Defendants' ""slum sign"" policy.

The Plaintiffs sued and alleged that the Defendants' actions in:

a. Placing the sign on Lawson's property in June, 1997 and leaving it there until December 3, 1999;

b. In not removing the "slum sign" from 442 S. Chicago Ave. identifying Lawson as the owner of slum property after he no longer owned it;

c. In not placing a "slum sign" identifying Neighborhood Partners of Kankakee, Inc. as the owner of slum property located at 442 S. Chicago Avenue from and after October 28, 1999;

d. In placing signs on properties not owned by Pitts naming Pitts as the owner of those properties;

e. In refusing to obey the August 16, 1999 Resolution and Order of the City Council directing Defendants to remove the "slum sign" identifying Pitts as the owner of the 319 S. Albert Ave. property;

were acts and omissions done by the Defendants in retaliation for Plaintiffs' exercise of their First Amendment rights (42 U.S.C. §1983) and were continuing violations from June, 1997 through and including the filing of the Plaintiffs' Complaint on November 18, 1999 and their Amended Complaint on April 27, 2000. The Defendants filed a Motion to Dismiss the Amended Complaint and alleged that both Plaintiffs' causes of action were barred by the statute of limitations.

On August 21, 2000 United States Magistrate Judge David G. Bernthal recommended that Plaintiffs' Amended

Complaint be dismissed with prejudice asserting it was barred by the two year statute of limitations.

On October 16, 2000 United States District Court Judge Michael P. McCuskey entered an order agreeing with the Magistrate's recommendation and dismissed the Plaintiffs' Amended Complaint with prejudice. Final judgment was entered by the Clerk of the Court on October 16, 2000 dismissing Plaintiffs' Amended Complaint with prejudice.

The Magistrate's Recommendation accepted by the District Court ruled that the continuous placement of the signs were not continuing violations and that the acts and omissions of the Defendants' deliberate failure to act in August, 1999 and October, 1999 were not "fresh acts".

The basis for the jurisdiction of the United States District Court was a Federal question brought under 42 U.S.C. §1983 and §1988 and 28 U.S.C. §1331 and 28 U.S.C. §1343 alleging the actions of the Defendants were done in retaliation for the exercise of Plaintiffs' First Amendment rights.

REASONS FOR GRANTING THE WRIT

I. A REVIEW BY THIS COURT IS NECESSARY TO ESTABLISH A UNIFORM BASIS TO RESOLVE THE CONFLICT AND CONFUSION AMOUNT LOWER COURTS REGARDING:

A. WHETHER A PERSON'S RIGHT TO SUE UNDER 42 U.S.C. §1983 TWO AND ONE-HALF (2-1/2) YEARS AFTER A NON-RELIGIOUS SIGN WAS ERECTED AND CONTINUOUSLY REMAINED AND WAS STANDING AT THE TIME HE FILED HIS COMPLAINT ALLEGING THE SIGN VIOLATED HIS RIGHTS UNDER THE "FREE SPEECH CLAUSE" OF THE

FIRST AMENDMENT IS ENTITLED TO THE SAME CONSTITUTIONAL PROTECTION AFFORDED A PERSON WHO SUED TWENTY-SEVEN (27) YEARS AFTER A RELIGIOUS SIGN WAS ERECTED AND CONTINUOUSLY REMAINED AND WAS STANDING AT THE TIME THAT COMPLAINT WAS FILED ALLEGING A VIOLATION OF THE "ESTABLISHMENT CLAUSE" OF THE FIRST AMENDMENT.

The Petitioners were retaliated against by the Defendants after Petitioners publicly opposed various programs and policies of the Defendants when the Defendants erected a sign on property owned by Petitioner Lawson describing him as the owner of "slum property" and erected a sign on two other properties identifying Petitioner Pitts as the owner of "slum property" when Pitts did not own those properties. The signs were erected in June, 1997 and stayed up and were up continuously when the Petitioners filed their Complaint in November, 1999.

One of the signs identifying Pitts as the owner of "slum property" was not removed by the Defendants even after the Kankakee City Council passed a Resolution in August, 1999 directing its removal. Petitioner Lawson sold the property upon which the Defendants had placed a sign in October, 1999, but contrary to the Defendants' "slum sign" policy Defendants did not remove the sign identifying Lawson as the owner of the "slum property" nor did they put a new sign identifying the new property owner as owner of "slum property" even though there had been no change in condition in the property since the sign was first erected.

The United States Court of Appeals opinion in Pitts v. City of Kankakee, 267 F.3d 592 (7th Cir. 2001) held the Petitioner's Complaint was barred by the two year statute of limitations because they had not sued within two years of the erection of the signs even though the signs stayed up continuously until the Petitioners filed their Complaint.

The 7th Circuit further concluded that the deliberate refusal of the Defendants to obey the City Council's

Resolution of August, 1999 to remove Pitts' sign and their deliberate refusal to adhere to their own sign policy after Petitioner Lawson no longer this property were not "fresh acts", but were lingering effects of the initial discrimination in concluding that the refusal to undo a violation is not a "fresh act" but only the persisting effect of past discrimination.

The Court of Appeals ruling in Pitts v. City of Kankakee, supra; was in direct conflict with another 7th Circuit decision; Gonzales v. North Township of Lake County, 4 F.3d 1412 (7th Cir. 1993).

The 7th Circuit decision in Gonzales v. North Township Lake County, supra; affirmed that portion of the United States District Court decision in the same case in defining what was a continuing violation of the First Amendment, Gonzales v. North Township of Lake County, 800 F.Supp. 676 (N.D. Ind. 1992).

In Gonzales v. North Township of Lake County, supra; the 7th Circuit held that a religious display erected by Defendants in 1955 and which continuously remained erected on public property when Plaintiffs in Gonzales sued some twenty-seven (27) years after the religious sign was erected had standing and was timely filed even though Plaintiffs were aware of the religious sign more than two years before the suit was filed.

The District Court ruled and the 7th Circuit affirmed that the Complaint was not barred by the statute of limitations because the Plaintiffs in Gonzales had alleged a continuing violation of their First Amendment rights and each day the religious sign remained in place was a new violation and therefore a new cause of action.

The Petitioners in this case suffered the same kind of ongoing, continuing injury. Once the signs were posted in retaliation by Defendants they remained on Petitioners' properties identifying them as owners of "slum property". Each and every day someone saw the signs Defendants accomplished their goal of retaliating against the Petitioners. Each and every day, continuously for two and one-half (2-1/2) years, those signs spoke to and told different people that the Petitioners were owners of "slum property".

The continuing violation alleged by the Petitioners in this case was no different that the continuing violation alleged by the Plaintiffs in Gonzales v. North Township of Lake County, supra. There is no authority for a Constitutional difference where this Court has ruled that persons injured under the "Establishment Clause" of the First Amendment are entitled to a higher level of Constitutional protection than persons injured under the "Free Speech Clause" of the First Amendment.

The only difference between Gonzales v. North Township of Lake County, supra; and the Petitioners' Complaint was that the sign in Gonzales v. North Township of Lake County, supra; contained a religious message and the Petitioners' sign didn't. Such distinction is without authority under law. This Court should grant the Writ in this case to establish that all the clauses of the First Amendment are entitled to the same level of Constitutional protection.

The Circuit Court decision is also in conflict with what this Court to find as an ongoing injury in "continuing violation" cases. Although it was an anti-trust case this Court held in Hanover Shoe v. United States Machine Corporation, 392 U.S. 481 (1968) that an action is not time barred because it is a continuing violation and described the continuing harm as that which conflicts continuing and accumulating harm.

The Petitioners suffered the same kind of ongoing, continuing injury because every day the signs were up in retaliation of their First Amendment rights, the signs inflicted continuing and accumulating harm on the Petitioners.

B. WHETHER THE SAME STANDARDS APPLY TO CONTINUING VIOLATIONS OF A PLAINTIFF'S FIRST AND FOURTEENTH AMENDMENT RIGHTS AND A PLAINTIFF'S EMPLOYMENT DISCRIMINATION RIGHTS IN DETERMINING WHEN THE STATUTE OF LIMITATIONS BEGINS OR IS TOLLED.

This Court has granted Certiorari in Morgan v. National Railroad Passenger Corp., 232 F.3d 1008 (9th Cir. 2000), cert. granted 121 S. Ct. 2547 (2001) (No. 00-1614)

because of the conflict and confusion among various lower Courts regarding what is a continuing violation in employment discrimination cases.

By granting Petitioners' Writ in this case this Court would then have the ability to eliminate the remaining conflict and confusion among lower Courts regarding whether the same standards apply in determining what is a continuing violation of a person's Constitutional rights. The Court of Appeals in Pitts v. City of Kankakee, supra; erroneously applied employment discrimination criteria in concluding the one act of posting the signs, even though the signs remained standing, was not a continuing violation.

The 7th Circuit's ruling is in direct conflict even applying employment discrimination standards in determining when the statute of limitations begins or runs because the Petitioners' Amended Complaint alleged a systematic policy discrimination, and is in conflict with Williams v. Owens-Illinois, Inc., 655 F.2d 914 (9th Cir. 1980), where the 9th Circuit held that a person's rights are violated each day the discriminatory policy remained in effect regardless of when a particular discriminatory act occurred and ruled that a systematic policy discrimination is actionable anytime because regardless of when a person's employment rights are violated pursuant to said ongoing discriminatory policy. The discriminatory policy itself is a violation that continues as long as the employee remains subject to it. This Court refused to accept certiorari in that case.

When the course of conduct of retaliation has distinct acts any act consistent with retaliation which occurs within the limitations allows the injured person to go back and reach the barred act. The Petitioners alleged and linked in no uncertain terms the act of placing the signs in the first place with the Defendants' deliberate refusal to take the signs down. Since the only subject matter of the retaliation was the signs, putting them up and leaving them up established the policy of the Defendants' retaliation against the Petitioners for the exercise of their First Amendment rights which was exactly the case in Williams v. Owens-Illinois, Inc., supra.

Cases involving how to apply the continuing violation theory for non-employment discrimination claims under §1983 is an unsettled question even when Petitioners allege a series of separate acts, LRL Properties v. Portage Metro Housing Authority, 55 F.3d 1097 (6th Cir. 1995).

Systematic violations are the result of an express policy or practice that continued into the limitations period and therefore the Court of Appeals holding in this case is in conflict with Pike v. City of Mission, 731 F.2d 655 (10th Cir. 1984). It is also in conflict with Cornwell v. Robinson, 23 F.3d 694 (2nd Cir. 1994).

Even though those cases involved systematic discriminations involving a series of acts, Petitioners' case is much stronger since it was one continuous act placing and leaving the sign up in retaliation which violated their rights under the First Amendment; and since it was an express policy or practice the statute of limitations did not begin to run until the Defendants committed the last act in furtherance of the system or policy which was the removal of the retaliatory signs after Petitioners filed their Complaint, Cornwell v. Robinson, supra.

The decisions are not only in conflict with the 7th Circuit's holding in this case but a substantial number of cases describing the confusing nature of what is a continuing violation when a Constitutional claim is alleged or when an employment discrimination complaint is alleged. Berry v. Board of Supervisors of LSU, 715 F.2d 971 (1983) wherein the 5th Circuit observed:

> "the precise contours and theoretical bases of the theory are at best unclear and case law is both inconsistent and confusing. "Berry v. Board of Supervisors of LSU, 715 F.2d, p.979, n. 11.

In fact the 7th Circuit in this case made the same observation regarding:

> "...drawing the line between something that amounts to a "fresh act" each day and

> something that is merely a lingering effect of an earlier, distinct violation is not always easy.." 267 F.3d p.596

Other Circuit Courts have also used the words inconsistent and confusing on the subject of continuing violations. See Dumas v. Town of Mount Vernon, 612 F.2d 974 (5th Cir. 1980); Scarlett v. Seaboard Coast Line, R.Co., 676 F.2d 1043 (5th Cir. 1982).

At least one Court considers the theory or certain of its aspects to be analogous to the concept of a continuing trespasses in tort law. See Thomas v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982). The continuing trespass analogy is fairly applicable to why the Petitioners' Complaint was not barred by the statute of limitations since the signs was erected on properties continuously with Lawson's sign being erected continuously on his property.

Although there have been very few cases which consider the continuing violations theory in 42 U.S.C. §1983 cases the Circuit Court's holding is also in conflict with Robinson v. Maruffi, 895 F.2d 649 (10th Cir. 1990) where the 10th Circuit found that §1983 claims for false arrest, false imprisonment and malicious prosecution may form part of a conspiracy to violate the Plaintiff's Constitutional rights. Petitioners' facts are stronger because it alleges the conspiracy between the Defendants to violate the Petitioners' Constitutional rights by one act of retaliation which continued past the filing of the Petitioners' Complaint.

In fact, even where there are separate and distinct acts the 7th Circuit's holding in this case conflicts with its decision involving a Constitutional claim in Baker v. F&F Inv. Co., 489 F.2d 829 (7th Cir. 1973) where the 7th Circuit held:

> ...had the Defendants at any time ceased their wrongful conduct further injury to the Plaintiffs could have been avoided and new injury was inflicted each day..."

The 7th Circuit's decision is directly in conflict further with Kelly v. Metropolitan County Board of Education

Nashville, 836 F.2d 986 (6th Cir. 1987) holding that when the injury causing activity continues over time, unabated conduct is not legitimized by the passage of time and that acquiescence to a continuing violation of the person's Constitutional rights does not extinguish the individual's rights.

It is also in conflict with Chaudhuri v. The State of Tennessee, 767 F.Supp. 860 (M.D. Tenn. 1991) where the District Court refused to dismiss Plaintiff's §1983 claim because the Plaintiff had pled he was forced to attend Christian prayer services which were an ongoing policy, practice or custom of the Defendant in violation of his Constitutional rights even though the policy was established beyond the statue of limitations when the Plaintiff in that case sued.

The Petitioners' Amended Complaint alleged the same unconstitutional actions on the part of the Defendants as final policy makers of the Defendant City of Kankakee with respect to their "slum sign" policy and since the Petitioners remained subject to the unconstitutional retaliation, the law does not require any further acts because the unconstitutional action inflicted injury on both Petitioners continuously within the statute of limitations - the limitations was tolled and did not begin to run until the unconstitutional action ended or the Plaintiffs were no longer the subject of the unconstitutional policy, Mack v. Great Atl. & Pac. Tea Co., 871 F.2d 179 (1st Cir. 1989).

The confusion is so pervasive that numerous law review articles has been written regarding the confusing nature and conflicting tests in determining what beings and tolls the statute of limitations in continuing violation cases. Confusion in the 6th Circuit; the Application of the Continuing Violation Doctrine to Employment Discrimination,60 U.Cin.L. Rev. 1335 (1992); The Continuing Violation Theory and Systematic Discrimination In Search of a Judicial Standard for Timely Filing, Vand.L.Rev. 1171 (1988); NOTE: KING V. PHELPS DUNBAR, L.L.P.: A Catch 22 for Louisana Law Firms, 60 La. L.Rev. 929 (2000)

C. WHETHER THERE ARE DIFFERENT CRITERIA FOR DETERMINING WHAT IS A "FRESH ACT" VIOLATING A PERSON'S FIRST OR FOURTEENTH AMENDMENT CONSTITUTION RIGHTS AND A "FRESH ACT" IN AN EMPLOYMENT DISCRIMINATION ACTION REGARDING WHAT CONSITITUTES "DELIBERATE INDIFFERENCE" AND FAILURE TO UNDO A DISCIMINATORY ACT IN DETERMINING WHEN THE STATUTE OF LIMITATIONS BEGINS OR IS TOLLED.

The Seventh's Circuit opinion in Pitts v. City of Kankakee, supra; held that there were no "fresh acts" by the Defendants deliberate violation of the August, 1999 City Council Resolution directing the removal of Plaintiff Pitts' sign and then Defendants' failure to follow their sign policy and that said acts were only lingering effects of an earlier violation. This is contrary to and conflicts with the 7th Circuit's decision regarding what is a "fresh act" of retaliation as the 7th Circuit held in Cornfield ex. rel. Lewis v. Consolidated High School District #230, 991 F.2d 1316 (7th Cir. 1993):

> "...taken together these two considerations amount to a requirement that liability based on a findings that the policy makers have actual or constructive notice that a particular omission is likely to result in Constitutional violations..."

In fact the Circuit Court's reasoning regarding "failure to undo a discriminatory act" carries with it the obvious conclusion that the Defendants and no one else had the ability or right to undo such a discriminatory act. That may be an appropriate test to use in an employment discrimination setting where the employer only has such ability but in this case one of the reasons this Court should, in granting the writ, establish a distinction between the failure

to undo a discriminatory act in an employment setting and in a private person's rights under 42 U.S.C. §1983; because the City Council's Resolution ordering the removal of Pitts' sign is inconsistent with the Circuit Court's reasoning because the City Council had the ultimate authority and the Defendants' actions were in violation of the lawful resolution of the City Council rendering any analysis by the Circuit Court regarding the Defendants' failure to undo a discriminatory act inapplicable, because it was a "fresh act" of retaliation just as the Defendants' failure to follow their "slum sign" policy, in leaving Petitioner Lawson's sign up unchanged was a "fresh act" of retaliation.

II. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE 7TH CIRCUIT SHOULD BE REVERSED AND REMANDED BACK TO THE UNITED STATES DISTRICT COURT REINSTATING PETITIONERS' AMENDED COMPLAINT BECAUSE THE AMENDED COMPLAINT ALLEGED A CONTINUING VIOLATION BY THE DEFENDANTS RETALIATING AGAINST THE PETITIONERS FOR EXERCISING THEIR FREE SPEECH RIGHTS UNDER THE FIRST AMENDMENT AND WAS TIMELY FILED EITHER THE BECAUSE THE "SLUM SIGNS" ERECTED BY THE DEFENDANTS IN RETALIATION IN JUNE, 1997 WERE UP CONTINUOUSLY FROM THEN UNTIL AFTER THE FILING OF THE PETITIONERS' COMPLAINT, OR IN THE ALTERNATIVE, BECAUSE "FRESH ACTS" OF RETALIATION AGAINST THE PETITIONERS BY THE DEFENDANTS IN AUGUST AND IN OCTOBER, 1999 OCCURRED WITHIN TWO YEARS OF THE FILING OF THEIR COMPLAINT, AND THEREFORE, UNDER EITHER BASIS, PETITIONERS' COMPLAINT WAS NOT BARRED BY THE STATUTE OF LIMITATIONS.

The foregoing analysis and authorities establish the reversible error of the Court of Appeals decision in this case. However, the Court of Appeals decision went beyond the

boundaries of any facts within the Record or issues in the case when it created the unpled injury of defamation no where found within Petitioners' Complaint in attempting to distinguish Gonzales v. North Township of Lake County, supra.

The Petitioners' Amended Complaint did not plead defamation within the body of the Amended Complaint nor was defamation a basis for any of the damages prayed for within the Amended Complaint. The reason is obvious. It is well settled law that the Defendants, as public officials, are absolutely immune from a defamation claim as basis of a Constitutional violation, Hernandez v. Joliet Police Department, 197 F.3d 256 (7th Cir. 1999) which case is very important because it did not involve a First Amendment retaliation claim.

In fact, under the Circuit Court's reasoning it would be impossible to plead a First Amendment retaliation cause of action because it would always involve given the pretextual basis for the government's action, incidental injury to a person's reputation.

The Court, in trying to distinguish the indistinguishable difference between defamation alone and defamation under 42 U.S. C. §1983 stated at p. 566 of its opinion:

> "but here we have a claim of defamation as the basis of retaliation as a method of retaliation for the exercise of First Amendment rights"

Nowhere in the Amended Complaint, the Defendants' Motion to Dismiss, the Magistrate's recommendation or the District Court's decision was defamation mentioned as being the injury caused by the retaliation.

Because Plaintiffs' Complaint did not allege defamation but merely alleged the continuous placement of the signs in retaliation for Plaintiffs' exercise of their First Amendment rights when the Plaintiffs either did not own the property at all, or in the case of Lawson, after he had sold the property, the Complaint alleged a "continuing violation" of their First Amendment rights.

The Court of Appeals' decision in Gonzales v. North Township of Lake County, supra; affirmed that portion of the District Court's decision in the same case with respect to what was a continuing violation under the First Amendment. In Gonzales v. North Township of Lake County, 800 F.Supp. 676, supra; the Defendants erected a religious display in 1955 and one of the Plaintiffs joined in the lawsuit filed some 27 years after the religious statue was first erected was found to have standing.. Even that Plaintiff was aware of the erection of the religious monument well before the two year limitations period. The District Court found and the 7th Circuit affirmed in holding that the action was not barred by the statute of limitations because Plaintiffs had alleged a continuing violation of their First Amendment rights and each day the religious symbol remained was there was a new violation and a new cause of action.

The Plaintiffs in this case suffered the same kind of ongoing continuing injury. Once the signs were posted in retaliation they remained on both Plaintiffs' property identifying them as the owners of slum property. Each and every day someone saw the signs Defendants accomplished their goal of retaliating against the Plaintiffs. Each and every day continuously for two and one –half years those signs spoke to and told different people that Plaintiffs were the owners of slum property.

What the 7th Circuit seems to have ruled, was that if the Plaintiffs' Complaint had been filed within two years it would have stated a non-dismissible cause of action. This is contrary to the well settled law, because under 42 U.S.C. §1983 defamation claims never state a cause of action based on the absolute immunity afforded public officials. Hernandez v. Joliet Police Department, supra.

Petitioners' Complaint alleged retaliation by the Defendants for their First Amendment rights by the erection of the "slum signs". Petitioners never alleged defamation as a cause of action, as was the case in Hernandez v. Joliet Police Department, supra; and the 7th Circuit's speculation defining the unpled injury as defamation was not only irrelevant to Plaintiffs' cause of action but ignored the fact Petitioners

could have proven a number of facts establishing Defendants' retaliation was unrelated to defamation.

By way of illustration, if Petitioner Lawson's property had minor code violations (although not pled or admitted herein but hypothetically assumed for purposes of argument) established there were more than 100 properties with more serious code violations and in much worse condition deserving of slum signs if the Defendants had properly followed their "slum sign policy", then defamation would not even have been part of Petitioners' injuries in their First Amendment claim of retaliation (even though Petitioners did not allege injury to their reputation in respect to the damages they suffered) because Defendants would have singled them out in violation of their "sign policy" in retaliation for Petitioners' exercise of their First Amendment rights.

Numerous United States District Courts and Courts of Appeals have held that the deliberate failure to act is a "fresh act" causing a new violation of Plaintiff's Constitutional rights if it occurs outside the original statute of limitations.

When the "continuing violation doctrine" with respect to "fresh acts" is discussed in First Amendment cases, Federal Courts do not consider when the Plaintiff should have known the violation. It is clear from the cases that the consideration involves whether or not Plaintiff to reach back and bring in acts of retaliation which fall outside of the statute of limitations for purposes of establishing damages when acts of retaliation occur within the statute of limitations, Ferner v. Village of Sheffield, 656 F.Supp. 1017 (N.D. Ohio 1987).

In this case William Ferner was a police officer who in December, 1983 told some people that they could file a Complaint with the police because of police misconduct. Ferner told them again some four days later that they could contact the ACLU and talk to the press about their concerns.

On January 30, 1984 Ferner was suspended by the Village of Sheffield for the statements made in December, 1983. On February 3, 1984 his suspension was reduced to 45 days. Ferner alleged that since February, 1984 his working hours had been reduced in retaliation for the statements in 1983. The applicable statute of limitations in Ohio was one year.

Ferner sued the Village in October, 1995 and the United States District Court considered whether Ferner was able to reach back to acts of retaliation which occurred outside the statute of limitations and concluded he could.

The United States District Court Judge in Ferner, supra; correctly stated the law, in holding that the actions which took place outside of the statute of limitations were not time barred when it said at 656 F.Supp. at p.1024:..."the damages are permitted for conduct occurring outside the limitations so long as the conduct is part of a continuing violation with one event occurring within the limitations..".

A "fresh act" which occurred within the limitations period was the Defendants deliberate failure to act in direct disobedience of the order of the Kankakee City Council ordering the removal of the Pitts' "slum sign" at 319 S. Albert Ave.

A Defendant's failure to act, when acting under "color of law" has been found by many Courts to apply to many different Constitutional violations. Supervisory officials in a Department of Education were held liable for deliberate indifference which led to the violation of a Plaintiff's First Amendment rights in Ferdandez v. Chardon, 681 F.2d 42 (1st Cir. 1982) and in Doe v. New York City Department of Social Services, 469 F.2d 134 (2nd Cir. 1981). The Court ruled that that a supervisory child placement personnel could be liable for deliberate indifference and breach of statutory duties which brought about Constitutional deprivations.

All of these "failure to act" cases traced their progeny back to City of Canton v. Harris, 109 S.Ct. 1197 (1989). So long as the "fresh act" is linked to the act that occurred outside the limitations Pitts' claim was not barred.

Pitts has linked in no uncertain terms the act of placing the signs in the first place with their deliberate refusal to take the sign down in violation of the Defendants' sign policy. Since the only subject matter of the retaliation was the sign, leaving it up and the "fresh act" of deliberately failing to take Pitts' sign down was a new violation of Pitts' First Amendment rights and are acts which are so related there can be no question that they were part of the policy of the Defendants' retaliation against Plaintiff Pitts.

It is further well settled law that once having alleged the Constitutional injury the question of a Municipality's liability for failure to act requires deliberate indifference when policy makers have actual or constructive notice that a particular omission is likely to result in Constitutional violations, Cornfield ex rel. Lewis v. School District No. 230, 991 F.2d 1316 (7th Cir. 1993).

In this case the Defendants admitted that the Defendants Donald Green and Christopher Bohlen, as Mayor and Corporation Counsel, were the final policy makers with respect to the "slum sign" policy and not only did they have constructive notice but they had actual notice when they failed to obey the City Council's Resolution to take down Pitts' one sign in August, 1999.

The Defendants ignored the Resolution of the City Council. They breached their statutory duty to obey the action of the City Council. Such a breach of statutory duties in failing to act was a "fresh act" of illegality within the statute of limitations, Doe v. New York City Department of Social Services, supra.

The 7th Circuit erred as a matter of law in finding that the failure of the Defendants to remove Lawson's "slum sign" at 442 S. Chicago Ave., even if done deliberately with the intent to continue to retaliate was not a "fresh act" within the statute of limitations. This is simply not the law.

Petitioner Lawson adopts the argument and cases cited with respect to Plaintiff Pitts' argument regarding the "fresh acts" of retaliation as contained within this Writ.

The Defendants publicly stated the purpose of the "slum signs" was to in effect to target and embarrass the property owner into fixing up his property and Defendants knew sometime prior to October 27, 1999 that Neighborhood Partners of Kankakee, Inc., purchasing Lawson's property.

The only explanation for the Defendants' refusal to take down Lawson's sign after they knew he no longer owned the property was that they were continuing to retaliate against Lawson. He no longer owned the property, so it was only Lawson's ownership of the property which caused the "slum sign" to go up. The fact that no sign was posted stating Neighborhood Partners owned slum property is evidence that

by the failure to post said sign, the Defendants were not seeking to remedy any code violations at 442 S. Chicago Ave. but were merely seeking to retaliate against Lawson.

What the plain language of these cases hold when continuing violations of a person's Constitutional rights are violated that when the course of conduct of retaliation has distinct acts, that any act consistent with retaliation which occurs within the limitations allows the Plaintiffs to go back and reach the barred acts.

CONCLUSION

For all the reasons identified herein a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the 7th Circuit and ultimately to vacate and reverse that decision finding the Petitioners' Amended Complaint was not barred by the statute of limitations and to remand the matter to the United States District Court for further proceedings.

Respectfully submitted,
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No. 00-3889

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Michael Pitts and Charles Lawson,
Plaintiffs-Appellants,

v.

City of Kankakee, Illinois, et al.,
Defendants-Appellees.

March 7, 2001, Argued

September 24, 2001, Decided

COUNSEL:
For MICHAEL PITTS, CHARLES LAWSON, Plaintiffs - Appellants: Charles E. Ruch, Jr., Bourbonnais, IL USA.

For CITY OF KANKAKEE, DONALD E. GREEN, CHRISTOPHER BOHLEN, Defendants - Appellees: William W. Kurnik, KNIGHT, HOPPE, KURNIK & KNIGHT, Des Plaines, IL USA.

JUDGES:
Before Diane P. Wood, Evans, and Williams, Circuit Judges.

OPINION BY:
Diane P. Wood

OPINION:

Diane P. Wood, *Circuit Judge.* Like the plaintiff in *Albiero v. City of Kankakee, 246 F.3d 927 (7th Cir. 2001)*, Michael Pitts and Charles Lawson brought a suit under the federal civil rights statute, *42 U.S.C. § 1983*, challenging the City of Kankakee's placement of "slum" signs on certain properties. There, however, the similarity between these two

cases ends. In *Albiero*, this court considered the merits of an equal protection challenge to the City's actions labeling the plaintiff a "slum lord," and affirmed a judgment for the City. Here the question is procedural: did these plaintiffs sue too late? The magistrate judge, and then the district court, concluded that the complaint was time-barred. We agree with this assessment and therefore affirm the district court's judgment dismissing the claims.

I

According to the complaint, whose allegations we accept for present purposes, see *Kennedy v. Nat'l Juvenile Detention Ass'n, 187 F.3d 690, 694 (7th Cir. 1999)*, plaintiffs Pitts and Lawson publicly supported and campaigned for the opponent of Kankakee Mayor Donald E. Green in the elections held in 1993 and 1997. Pitts and Lawson are officers in the Kankakee Landlords Association, or KLA. Beginning in 1994, they also publicly opposed various city policies relating to landlord licensing. During the 1997 mayoral campaign, the KLA invited candidates to participate in a public forum. Mayor Green did not wish to participate, but Corporation Counsel Christopher Bohlen asked if he could speak on the Mayor's behalf. The KLA refused, and thereafter Mayor Green and Bohlen developed a plan to retaliate against Pitts and Lawson by embarrassing them.

The retaliation took the form of strict enforcement of the City's codes. First, in January 1997, Pitts received a notice from the City stating that the owner of the property located at 319 South Albert had 180 days in which to correct specified violations of the City's building code. The City sent this notice to Pitts even though it was aware that Pitts did not own the property. After receiving the notice, Pitts, on behalf of the actual owner, made the required repairs. Despite the completion of the repairs, on June 11, 1997, the City placed a sign on the property identifying Pitts as the owner, listing his business address and telephone number, labeling the address "SLUM PROPERTY," and declaring that "the owner is in violation of city code and chooses not to bring the property into compliance thereby significantly contributing to the blight in this neighborhood." On June 13, 1997, the City

placed a similar sign on rental property owned by Lawson. Finally, on June 30, 1997, the City placed another sign on property located at 921 East Merchant, once again erroneously identifying Pitts as the owner.

On August 16, 1999, the Kankakee City Council ordered the removal of the sign located on the 319 South Albert property. The defendants, however, did nothing, and the sign stayed there until April 7, 2000. (It is unclear whether they finally removed it on the latter date or if it disappeared in some other way.) On October 27, 1999, Lawson sold his property to Neighborhood Partners of Kankakee, Inc., which made its purchase with the help of a loan from the City. Despite this sale and its own participation in the transaction, the City did not remove the slum sign identifying Lawson as the owner until December 3, 1999.

On November 18, 1999, Pitts and Lawson brought suit alleging that the City, Mayor Green, and Corporation Counsel Bohlen had violated their First Amendment rights by placing and maintaining the "SLUM PROPERTY" signs on the three properties in retaliation for the plaintiffs' political opposition. Later, on April 27, 2000, they filed an amended complaint. The defendants filed a motion to dismiss the amended complaint, which was referred to Magistrate Judge Bernthal. He prepared a report for the district court that recommended granting the defendants' motion on the ground that the case was barred by Illinois's two-year statute of limitations, which applies to § 1983 cases. The signs were all posted in June 1997, yet the plaintiffs waited approximately 29 months to file their action. The plaintiffs responded that this was a "continuing violation," and thus allowed them to file within two years of the last date when the signs were posted. That would have given them until April 7, 2002, for the South Albert property and December 3, 2001, for Lawson's property--dates that their November 1999 complaint easily satisfied; no date was specified for the removal of the sign on the Merchant property, although one allegation might permit the inference that April 7, 2000, was also the time when it was removed. The magistrate judge was not persuaded that this fit within the continuing violation doctrine; he saw the continuing presence of the signs as a lingering effect of the

previous violation. The district court agreed and dismissed the complaint.

II

As the district court recognized, the fate of this case turns on whether the plaintiffs have brought their suit in time. Their first effort to convince us that they have done so rests on the continuing violation concept. The continuing violation doctrine is, as we noted in *Heard v. Sheahan, 253 F.3d 316 (7th Cir. 2001)*, best characterized as a doctrine governing the accrual of a claim. *Id. at 319.* Normally, the statute begins to run from the date of an injury, but in several situations that rule does not apply. One is when it "would be unreasonable to expect the plaintiff to perceive offensive conduct," or when the earlier violation may be recognizable as actionable only in light of later events. See *Hardin v. S.C. Johnson & Son, Inc., 167 F.3d 340, 344 (7th Cir. 1999).* In other instances, illustrated well by the Supreme Court's decision in *Bazemore v. Friday, 478 U.S. 385, 92 L. Ed. 2d 315, 106 S. Ct. 3000 (1986)*, each day or week brings a fresh wrong. In *Bazemore*, for purposes of a Title VII wage discrimination claim, the Court endorsed Justice Brennan's statement that "each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." *Id. at 395-96.* To similar effect is a district court case on which the plaintiffs rely, *Gonzales v. N. Township of Lake County, 800 F. Supp. 676 (N.D. Ind. 1992), reversed on grounds unrelated to the statute of limitations, 4 F.3d 1412 (7th Cir. 1993).* There the plaintiffs wanted to challenge the maintenance of a religious monument that had been erected 27 years before the complaint was filed. The district court decided that the case was not time-barred, because the claim accrued every day the monument remained on display. It dismissed on other grounds, but this court reversed, upheld the plaintiffs' standing, and found that the display violated the Establishment Clause. See *Gonzales, 4 F.3d at 1422.*

Drawing the line between something that amounts to a "fresh act" each day and something that is merely a lingering

effect of an earlier, distinct, violation is not always easy. (Indeed, this area is so confused that the Supreme Court recently granted *certiorari* in *Morgan v. National Railroad Passenger Corp., 232 F.3d 1008 (9th Cir. 2000), cert. granted, 121 S. Ct. 2547 (2001)* (No. 00-1614), which involves precisely this point. Our task at present, however, is to apply the law as it now stands to the best of our ability.) In this case we think that the district court was correct to characterize the Pitts/Lawson complaint as merely a lingering effect of an earlier violation. The point of *Bazemore* was that as long as the discriminatory paychecks keep coming, it is still possible to implement a remedy that eradicates that discrimination, though the Court noted as well that recovery might not be permitted for pre-1972 acts of discrimination. *478 U.S. at 395.* Here, in contrast, the City took only one action for each parcel of land, and each action affected only one person: on particular dates, it posted "SLUM PROPERTY" signs. As of that moment, the plaintiffs knew they had suffered an injury; and nothing new happened thereafter to change the nature of the injury, save for a kind of continuing defamation that we discuss below.

The *Gonzalez* situation comes closer to this case, but in the final analysis we consider it distinguishable as well. The First Amendment's command that there be no establishment of religion stands on a different footing from a private individual's interest in avoiding defamation. All citizens have an interest in preventing government from sponsoring one particular religion, however worthy the tenets of that faith may be. Indeed, it might not be too much to say that an important part of the reason why the United States has been fortunate enough to escape most of the religious conflict that has plagued other parts of the world is that the Constitution itself demands that the government maintain a position of absolute neutrality among religions. Potential violations of this principle may not be obvious, however, to those who share a common background. In a predominantly Christian community, it may take a Buddhist, or a Moslem, or a Jew, or an atheist, to call to the authorities' attention a possible violation of the Establishment Clause. The rights of such citizens do not expire simply because a monument has been

comfortably unchallenged for twenty years, or fifty years, or a hundred years. Each day, as our own opinion in Gonzalez implicitly recognized, brings a new duty on the government's part, and a corresponding new right to seek vindication of the constitutional right in question.

The complaint Pitts and Lawson wish to raise is significantly different. At bottom, they wish to say that the City is defaming them by identifying them as owners of slum property, and that it is doing so at Mayor Green and Corporation Counsel Bohlen's instigation to retaliate against them for their political views. The City published its insulting accusations in each case with a single sign, put up on one day and left undisturbed for a period of time. Defamation alone, of course, is not something that is ordinarily cognizable under § 1983, see *Paul v. Davis, 424 U.S. 693, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976)*, but here we have a claim of defamation as a method of retaliation for the exercise of First Amendment rights. But this simply rephrases the question: did the alleged retaliatory acts all occur in June 1997, or did they continue each day the signs were on the properties? The question when a § 1983 claim accrued is a characterization issue that is governed by federal law. See *Wilson v. Garcia, 471 U.S. 261, 270, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985)*.

We think that the best analogy here, for purposes of deciding when this claim accrued, is to cases in which a single publication defames a person, often over a period of time as copies of that newspaper, or book, or other material, circulate around a community. These kind of claims fall under what is known as the "single publication rule," recognized both in the Uniform Single Publication Act promulgated by the National Conference of Commissioners on Uniform State Law, and in the Restatement (2d) of Torts § 577A (1977). As it happens (though this is not dispositive since we are dealing with a federal law issue), Illinois has enacted the Uniform Act. See 740 ILCS 165/1. That statute provides that a cause of action for libel is complete at the time of first publication, and any subsequent appearances or distributions of copies of the original publication do not toll the statute of limitations. See, *e.g., Founding Church of Scientology of Washington, D.C. v. American Medical Ass'n,*

60 Ill. App. 3d 586, 377 N.E.2d 158, 160-61, 18 Ill. Dec. 5 (Ill. App. 1978). Compare also *Bryson v. News America Publications, Inc., 174 Ill. 2d 77, 672 N.E.2d 1207, 1222, 220 Ill. Dec. 195 (Ill. 1996)* (holding that a cause of action for defamation accrues on the date the defamatory material is published to a third party). The signs on the three pieces of property at issue here are very much like a statement in a newspaper or on a billboard. For precisely the same reasons that the Restatement (2d) of Torts § 577A highlights, which relate to the need to prevent a multiplicity of lawsuits, we conclude that the single publication theory should apply to the present situation. The retaliatory acts that form the basis of the complaint Pitts and Lawson filed were complete in 1997. Only their effects lingered on until the signs were removed.

The plaintiffs also argue that the defendants' deliberate refusal to take down the offending signs was a fresh violation that makes this lawsuit timely. But this argument runs up against the principle, by now well established, that the refusal to undo a violation is not a "fresh act" of discrimination (or here, retaliation), but instead is a persisting effect of past discrimination that does not affect the running of the statute of limitations. See *Sharp v. United Airlines, Inc., 236 F.3d 368, 373 (7th Cir. 2001);* see also *Christiansen v. APV Crepaco, Inc., 178 F.3d 910, 916 (7th Cir. 1999)* (union's continuous failure to file a grievance is not a continuing violation).

It is undisputed that Pitts and Lawson did not file their lawsuit until November 1999, some 29 months after the three signs were posted, and thus 5 months beyond the two years permitted for actions under § 1983 in Illinois. We therefore Affirm the judgment of the district court dismissing their claims as time-barred.

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF ILLINOIS DANVILLE/URBANA DIVISION

MICHAEL PITTS and CHARLES LAWSON,
Plaintiffs,

v.

CITY OF KANKAKEE, ILLINOIS, an Illinois Municipal Corporation; DONALD E.GREEN, Individually and as Agent of the City of Kankakee; and CHRISTOPHER BOHLEN, Individually and as Agent of the City of Kankakee,
Defendants.

Case No. 99-C V-2281

ORDER

On August 21, 2000, the Magistrate Judge filed a Report and Recommendation in this case (#40). The Magistrate Judge recommended that Defendants' Motion to Dismiss Amended Complaint (#29) be GRANTED.

On September 5, 2000, Plaintiffs, Michael Pitts and Charles Lawson, filed an Objection to the Report and Recommendation (#41). Defendants filed a Response to Plaintiffs' Objection (#42) on September 14, 2000.

This court has reviewed the Magistrate Judge's reasoning, Plaintiffs' Objection and Defendants' Response. After a thorough and careful de novo review, this court agrees with and accepts the Report and Recommendation of the Magistrate Judge. This court therefore agrees with the Magistrate Judge that Defendants' Motion to Dismiss should be GRANTED because the statute of limitations bars Plaintiffs' claims.

IT IS THEREFORE ORDERED THAT:

(1) Plaintiffs' Motion to Strike Defendants' Response to Plaintiffs' Objection (#43) is DENIED. Rule 72 of the Federal Rules of Civil Procedure provides that a "party may respond to another party's objections within 10 days after being served with a copy thereof." Fed. R. Civ. P. 72(b).

(2) Defendants' Motion to Dismiss Amended Complaint (#29) is GRANTED. Plaintiffs' Amended Complaint (#2 I) is dismissed with prejudice.

(3) Plaintiffs' Motion for Order Compelling Disclosure and Discovery *(#35)* is stricken as MOOT.

(4) This case is terminated. The parties shall be responsible for their own court costs.

ENTERED this 16th day of October, 2000.

MICHAEL P. McCUSKEY
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

MICHAEL PITTS and CHARLES LAWSON,
Plaintiffs,

v.

CITY OF KANKAKEE, ILLINOIS, an Illinois municipal corporation; DONALD K GREEN, individually and as agent of the City of Kankakee; CHRISTOPHER BOHLEN, individually and as agent of the City of Kankakee;
Defendants.

Case No. 99-2281

REPORT AND RECOMMENDATION

In November 1999, Plaintiffs Michael Pitts and Charles Lawson filed a Complaint (#1) against Defendants, City of Kankakee, Illinois, an Illinois municipal corporation; Donald E. Green, individually and as agent of the City of Kankakee; and Christopher Bohlen, individually and as agent of the City of Kankakee. In April 2000, Plaintiffs filed an Amended Complaint (#21). In May 2000, Defendants filed a Motion To Dismiss Amended Complaint (#29). After reviewing the parties' pleadings and memoranda, this Court recommends, pursuant to its authority under 28 U.S.C. § 636(b)(1)(B), that Defendants' Motion To Dismiss Plaintiffs' Amended Complaint (#29) be GRANTED.

I. Background

Plaintiffs Pitts and Lawson are president and vice-president, respectively, of the Kankakee Landlords Association. Defendant Green is mayor of the City of Kankakee. Defendant Bohlen is corporate counsel for the City of Kankakee, During Green's 1997 mayoral campaign, Bohlen was a member of Green's campaign committee.

Plaintiffs allege that Defendants deprived them of their constitutional rights pursuant to Sections 1983 and 1988 of the Civil Rights Act (42 U.S.C. §§ 1983, 1988). They allege that from February 1997 to April 1997, they publicly supported and campaigned for the mayoral candidate running against Defendant Green. During the campaign, the Kankakee Landlords Association invited all candidates to a public forum. Green did not attend the forum; however, Bohlen asked to participate on behalf of Green. The Association refused and this angered Bohlen. Plaintiffs also contend that they publicly criticized Defendants about several issues concerning landlords.

Plaintiffs allege that, in June 1997, Defendants devised and carried out a plan to retaliate against them for their public opposition to Defendants. Defendants had signs placed on certain properties. One sign identified the property as "slum property," listed the owner as Mike Pitts, and listed Pitts' address and phone number. Pitts alleges that Defendants knew and had known since September 1994 that he did not own the property. A similar sign was placed on some property that Lawson owned. In October 1997, Lawson sold the property to Neighborhood Partners of Kankakee, Inc. Nevertheless, Defendants failed to remove the sign or change it to reflect the new owners. Until the filing of the complaint, the sign still listed Lawson as the owner.

Plaintiffs allege that Defendants' actions violated their constitutional rights because the signs were placed on the property in retaliation for their exercising their First Amendment rights. Furthermore, the actions were premeditated and malicious and done with the sole intent to embarrass, harass, and humiliate Plaintiffs.

In May 2000, Defendants filed a Motion To Dismiss Amended Complaint (#29), alleging that the statute of limitations bars Plaintiffs' claims.

II. Standard

The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the sufficiency of the complaint, not to decide the merits of the case. *Miller v. Reebie Storage and Moving Company, Inc.*, No, 93C3986, 1993 WL 414689, *1 (N.D. Ill. 1993). When considering a motion to dismiss, the Court must accept as true all well-pleaded factual allegations in the claim, and draw all reasonable inferences in the light most favorable to the nonmoving party. *Gutierrez*, Ill F.3d at 1368-69. The Court should dismiss the claim only if the nonmoving party can prove no set of facts consistent with the allegations of the complaint that would entitle him to relief. *Turner/Ozanne v. Hyman/Power*, Ill F.3d 1312, 1319-20 (7th Cir. 1997).

III. Discussion

Defendants argue that the statute of limitations bars Plaintiffs' claims. The statute of limitations for Section 1983 actions arising in Illinois is two years. *Johnson v. Supreme Court of Ilinois, 165* F.3d 1140, 1141 (7th Cir 1999). The signs were posted in June 1997. Plaintiffs filed their complaint in November 1999, more than two years after the signs were posted. Therefore, Defendants contend that the claims are time-barred.

Plaintiffs respond that the continuing violation doctrine tolls the statute of limitations. They concede that if a sign had been placed on the property in June 1997 and removed the next day, the claim would be time-barred. However, Defendants left the signs up. As a result, Plaintiffs contend that the retaliation continued for the two and one-half years that the signs were posted, into the period covered by the statute of limitations. Therefore, Plaintiffs contend that a continuing violation occurred and they should be able to reach back to the initial act of placing the signs. *See Togba v. Cook County*, 48 F.Supp.2d 1104, 1106 (N.D. 111. 1998) (holding that the statute of limitations is tolled when an open and express discriminatory policy remains in effect).

The doctrine of continuing violation allows a plaintiff to seek relief for a time-barred act by linking it with an act that occurs within the limitations period. *Selan* v. *Kiley*, 969 R2d 560, 564 (7th Cir. 1992). For purposes of the limitations period, courts treat such a combination as one continuous act that ends within the limitations penoct. *Id.* The continuing violation doctrine has been applied in three types of situations, as follows: (1) In the context of hiring and promotion decisions where the decision-making process takes place over a period of time, the limitations begin running when the employee knows that the decision has been made; (2) when there exists an express, openly espoused policy that is alleged to be discriminatory; and (3) when a covert practice of discrimination is followed over a period of time in such circumstances that a plaintiff can only realize that he is a victim of discrimination after a series of discreet acts, the period begins to run when the plaintiff gains such insight. *Jones v. Merchants Nat. Bk. & Trust Co.*, 42 Rid 1054, 1058 (7th Cir. 1994).

Here, Plaintiffs contend that the doctrine applies because Defendants followed an express and openly-espoused policy that was discriminatory. In such a situation, a plaintiff should be allowed to bring back an act of retaliation falling outside the statute of limitations for purposes of establishing damages for acts of retaliation occurring within the statute of limitations. *See Ferner v. Village of Shefield*, 656 F. Supp. 1017, 1024 (N.D. Ohio, 1987) (damages are permitted for conduct occurring outside the limitations, so long as the conduct is part of a continuing violation with one event occurring within the limitations).

The doctrine of continuing violation requires that a defendant engage in a "fresh act" of illegality to link the act that occurred outside the limitations period to the act that occurred during the limitations period. *Dasgupta v. University of Wisconsin Board of Regents*, 121 F.3d 1138, 1139 (7th Cir. 1997). The Seventh Circuit distinguishes between "a present consequence of a one-time violation and the continuation of the violation into the present." *Webb v.*

Indiana National Bank, 931 F.2d 434, 438 (7th Cir. 1991). In the employment context, the Seventh Circuit has held that an employer's refusal to undo a discriminatory decision is not a fresh act of discrimination. *Lever v. Northwestern Univ.*, 979 F.2d 552, *556* (7th Cir. 1992). In *Dasgupta*, another employment case, the Seventh Circuit again addressed the distinction between actionable continuing violations and nonactionable effects of time-barred discrimination. *Dasgupta*, 121 F.3d at 1130. Dasgupta claimed that as a result of national origin discrimination early in his career, his present salary was much lower than the salaries earned by his peers, even though they had all received similar raises in recent years. The court held that Dasgupta's claim was time-barred, stating as follows:

> There were no new violations during the limitations period, but merely a refusal to rectify the consequences of time-barred violations. It is not a violation of Title VII to tell an employee he won't get a raise to bring him up to the salary level he would have attained had he not been discriminated against at a time so far in the past as to be outside the period during which he could bring a suit seeking relief against that discrimination.

Dasgupta, 121 F.3d at 1140.

To support their argument that Defendants' failure to remove the sign constitutes a fresh act of illegality, Plaintiffs rely in part on case law involving municipal liability for failure to act pursuant to a Section 1983 claim. For example, in *The City of Canton v. Harris*, 109 S.Ct. 1197, 1204 (1989), the United States Supreme Court stated that a municipality's failure to act gives rise to a Section 1983 claim where it "amounts to deliberate indifference as to the rights of persons with whom the officials come into contact." *City of Canton*, 109 S.Ct. at 1204. To rise to the level of deliberate indifference, the failure to act must involve "actual or constructive notice" that such failure is likely to result in

constitutional deprivations. *Cornfield* v. *Consolidated High School District #230*, 991 F.2d 1316, 1327 (7th Cir. 1983). Plaintiffs argue that Defendants had actual or constructive notice that neither Plaintiff owned the properties. Plaintiffs also state that they have pled more than deliberate indifference; they have pled that Defendants knew and intentionally disregarded the fact that Plaintiffs did not own the properties. According to Plaintiffs, these facts should be enough to satisfy the requirement that the failure to act amounts to deliberate indifference.

Plaintiffs' reliance on *City of Canton* and *Cornfield* is unpersuasive. Those cases addressed the deliberate indifference standard in the context of a municipality's failure to train, rather than a failure to act. In this case, the failure to act - that is, the failure to remove the signs - did not provide actual or constructive notice that such lack of action would likely result in a
constitutional deprivation. Assuming a constitutional violation had occurred, it was already established by the posting of the signs, rather than leaving them in place for a period of time.

Based on the pleadings in this case, the Court concludes that the continuing violation doctrine does not apply in this case because Defendants did not do anything to link the act of placing the signs with the act of leaving the signs in place. Defendants' failure or refusal to remove the signs does not constitute a "fresh act"; the continuing presence of the signs on the properties constitutes a lingering effect of the previous violation, rather than a separate act of illegality.

Moreover, the purpose of applying the continuing violation doctrine is to protect the rights of a plaintiff in a situation where he could not be expected to file a lawsuit when it first occurred because the violation was unclear at the time and only became clear after it was repeated during the statute of limitations. *Dasgupta*, 121 F.3d at 1139. The Seventh Circuit addresses the doctrine of continuing

violations in the employment context as follows:

> The principle that we extract from this discussion and that we think organizes the complex and diffuse case law on continuing violations under Title VII is that the plaintiff may not base her (in some cases his) suit on conduct that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in the light of events that occurred later, within the period of the statute of limitations.

Galloway v. General Motors Service Parts Operation, 78 F.3d 1164, 1167 (7th Cir. 1996). Thus, the doctrine is applicable in situations of ambiguous or incomplete discrimination. *Dasgupta* at 1140. Here, the continuing presence of the signs provided Plaintiffs with no additional knowledge or information upon which they could base their claims of a constitutional violation. This is not a case of ambiguous or incomplete discrimination; any constitutional violation was clear at the moment the signs were posted. Based on the complaint, Plaintiffs had notice of the violations at the tinie the signs were first erected and did not choose to bring suit until after the two-year statute of limitations. Accordingly, the Court recommends granting the motion to dismiss.

Summary

For the reasons set forth above, this Court recommends that Defendants' Motion To Dismiss Amended Complaint (#29) be GRANTED. Plaintiffs' Motion for Order Compelling Disclosure and Discovery (#35) shall be stricken as MOOT. The parties are advised that any objection to this recommendation must be filed in writing with the clerk within ten (10) working days after being served with a copy

of this Report and Recommendation. *See* 28 U.S.C §636(b)(1). Failure to object will constitute a waiver of objections on appeal. *Video Views, Inc. v. Studio 2/, Ltd.*, 797 F.2d 538 (7th Cir. 1986).

ENTERED this 26th day of August, 2000.

DAVID G. BERNTHAL
UNITED STATES MAGISTRATE JUDGE

No. 00-3889

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Michael Pitts & Charles Lawson,
Plaintiffs-Appellants,

v.

City of Kankakee, Illinois, etc., et al.,
Defendants-Appellees.

October 18, 2001, Decided

COUNSEL:
For MICHAEL PITTS, CHARLES LAWSON, Plaintiffs - Appellants: Charles E. Ruch, Jr., Bourbonnais, IL USA.

For CITY OF KANKAKEE, DONALD E. GREEN, CHRISTOPHER BOHLEN, Defendants - Appellees: William W. Kurnik, KNIGHT, HOPPE, KURNIK & KNIGHT, Des Plaines, IL USA.

JUDGES:
Before Hon. DIANE P. WOOD, Circuit Judge, Hon. TERENCE T. EVANS, Circuit Judge, Hon. ANN CLAIRE WILLIAMS, Circuit Judge.

OPINION:

ORDER

On consideration of the petition for rehearing *en banc* filed by Counsel for the Plaintiffs-Appellants on October 9, 2001, all members of the original panel have voted to deny rehearing and no judge in regular, active service requested a vote on rehearing *en banc*. Accordingly,

IT IS ORDERED that the petition for rehearing *en banc* be, and the same is hereby, **DENIED**.

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF ILLINOIS URBANA/DANVILLE DIVISION

MICHAEL PITTS, and CHARLES LAWSON,
Plaintiffs,

vs.

CITY OF KANKAKEE, ILLINOIS, an Illinois Municipal Corporation; DONALD E. GREEN, Individually and as AGENT OF THE CITY or KANKAKEE; and CHRISTOPHER BOHLEN, Individually and as AGENT OF THE CITY OF KANKAKEE,
Defendants.

No. 99-2281 JURY TRIAL DEMANDED

AMENDED COMPLAINT

Now at this time come the Plaintiffs, Michael Pitts and Charles Lawson, by their attorney, Charles E. Ruch, Jr., and for their Complaint against the City of Kankakee, Illinois, an Illinois Municipal Corporation; Donald E. Green, individually and as Agent of the City of Kankakee; and Christopher Bohlen, individually and as Agent of the City of Kankakee, state as follows:

1. This is an action for damages against the Defendants for certain acts of omission and commission under Color of Law, which deprived the Plaintiffs of their rights secured and guaranteed by the United States Constitution, specifically the 1st and 14th Amendments, and the Civil Rights Act, Title 42, of the United States Code, Sections 1983 and 1980.

2. Jurisdiction is founded upon the existence of a Federal Question, to wit: 28 U.S.C. Section 1331. This action arises under 28 U.S.C. Section 1343. and 42 U.S.C. Sections 1983 and 1988.

3. Venue is proper in this District as all the Defendants reside therein, and the cause of action arose herein.

PARTIES

4. Plaintiff, Michael Pitts, is a citizen of the United States of America and a resident of Kankakee County, Illinois.

5. Plaintiff, Charles Lawson, is a citizen of the United States of America and a resident of Iroquois County, Illinois

6. Defendant, City of Kankakee, Illinois, is a Municipal Corporation duly organized and existing under the laws of the State of Illinois, and located wholly within the Central District.

7. Defendant, Donald Green, is Mayor of the City of Kankakee and resides in the City of Kankakee.

8. Defendant, Christopher Bohlen, is Corporation Counsel for the City of Kankakee and resides in the City of Kankakee.

COUNT I

9. Michael Pitts, Plaintiff, as and for his complaint against the Defendants states as follows:

10. Plaintiff, Michael Pitts, at all times pertinent hereto, was the President of the Kankakee Landlords' Association.

11. In February, March and April of 1993 Plaintiff Pitts publicly supported and campaigned for the election of the Democratic
Candidate for Mayor of the City of Kankakee who was opposing the then Republican Candidate, Donald Green.

12. Donald Green was elected Mayor of the City of Kankakee at the April, 1993 election.

13. Defendant Bohlen publicly supported and campaigned for Green in the 1993 election and was a member of Green's Campaign Committee.

14. Defendant Bohlen was appointed by Green when Mayor to the position of Assistant Corporation Counsel of the City of Kankakee in 1993, and became Corporation Counsel in April, 1997.

15. In March of 1991 Defendant Bohlen was elected Vice-Chairman of the Kankakee County Republican Central Committee

16. On or about February 23, 1997, and through April 1, 1997, Plaintiff Pitts, publicly supported and campaigned for the Democratic opponent running for Mayor against Defendant Donald Green who was running for re-election to the position of Mayor of the City of Kankakee.

17. Defendant Bohlen publicly supported and campaigned for Green during the 1997 Mayoral campaign.

18. On or about February 11, 1997, the Kankakee Landlords' Association held a public forum and invited all Republican and Democratic candidates for Mayor of the City of Kankakee.

19. At said forum Defendant Donald Green as a candidate did not appear.

20. Defendant Bohlen attended said February 11, 1997 forum and demanded to participate on behalf of candidate Donald Green.

21. Plaintiffs Pitts, as President of the Kankakee Landlords' Association, refused to allow Defendant Bohlen to participate on behalf of Green and Bohlen became publicly

agitated and upset at the refusal of Plaintiffs to allow him to participate and speak on behalf of Green.

22. Defendant Green was re-elected as Mayor of the City of Kankakee at the April, 1997 election.

23. From 1994 to the present, individually and on behalf of the Kankakee Landlords' Association, Plaintiffs Pitts, as the top officers of said organization, publicly criticized, argued with and opposed efforts by the Defendant, City of Kankakee, and Defendants Green and Bohlen regarding City of Kankakee's landlord's licensing ordinance; the policy of the City of illegally suing landlords personally for their tenants municipal utility charges; the illegal actions of employees of the City's Code Enforcement Department directed at landlords and their properties; and the decision of Defendants Green and Bohlen to place slum property signs on certain rental properties within the City of Kankakee.

21. In September, 1994, L. Patrick Power while acting in his capacity as Assistant Corporation Counsel for Defendant City of Kankakee, received actual notice that Plaintiff Pitts was not the owner of the property located at 319 S. Albert Avenue.

25. Un January 15, 1997, Plaintiff Pitts received a notice from the City of Kankakee Code Enforcement Department stating the City was giving the owner of the property located at 319 S. Albert, 180 days to correct certain alleged exterior violations on said property, attached hereto as Exhibit "A".

26. Sometime prior to June of 1997, Defendants Green and Bohlen, without approval of the Kankakee City Council and without authority under Illinois Law or city of Kankakee Ordinance, developed a plan to place 3' x 5' signs on the property of people who owned rental properties within the City of Kankakee.

27. Defendant Green stated the signs would list the property owner's name, address and home telephone number and that this sign would also state the owner was in violation of the City Code.

28. On or about June 11, 1997, 147 days after Pitts received Exhibit "A" Green directed the erection of a sign on the property located at 319 S. Albert which sign stated as follows:

SLUM PROPERTY!
THE OWNER OF THIS PROPERTY:
MIKE PITTS
1 RIVER LANE, KANKAKEE, ILLINOIS
935-0418
IS IN VIOLATION OF CITY CODE
AND CHOOSES NOT TO BRING
THE PROPERTY INTO
COMPLIANCE THEREBY
SIGNIFICANTLY CONTRIBUTING
TO THE BLIGHT IN THIS
NEIGHBORHOOD

29. On or about June 30, 1997, Defendant Green directed the erection of a sign located at 921 E. Merchant Street, Kankakee, Illinois which sign stated as follows:

SLUM PROPERTY!
THE OWNER OF THIS PROPERTY:
MIKE PITTS
1 RIVER LANE, KANKAKEE, ILLINOIS
935—0418
IS IN VIOLATION OF CITY CODE
AND CHOOSES NOT TO BRING
THE PROPERTY INTO
COMPLIANCE THEREBY
SIGNIFICANTLY CONTRIBUTING
TO THE BLIGHT IN THIS
NE IGHBORHOOD

30. Plaintiff Pitts was not at any time the owner of the property located at 319 S. Albert or 921 E. Merchant upon which the signs above-described were erected.

31. The phone number placed by Defendants on the sign 319 S. Albert and 921 E. Merchant Was, and is, the business phone number of Tri City Construction, a business, at all times pertinent hereto, solely owned by the Plaintiff Pitts.

32. That on or about January 15, 1997, Plaintiff Pitts received a notice from Defendant, City of Kankakee, alleging certain deficiencies in the property located at 319 S. Albert, Exhibit "A".

33. That Plaintiff Pitts on behalf of the owner of 319 S. Albert caused all the repairs specified in Exhibit "A" to be made.

34. On or about August 4, 1995, Plaintiff Pitts invited members of the Kankakee City Council and the City of Kankakee Code Department to inspect said property.

35. On or about August 4, 1999, an employee of said Code Department was present with various aldermen when said Code Department employee handed Plaintiff Pitts a notice attached hereto as Exhibit "B" and incorporated by referenced herein, informing Pitts that the sign with Pitts' name and business phone would never be removed.

36. That on or about August 16, 1999, at a regular meeting the Kankakee City Council voted and ordered the removal of the sign at 319 S. Albert Avenue.

37. Defendants refused to comply with the vote of the Kankakee City Council, and the sign as above-described remained on said property at 319 S. Albert Avenue until April 7, 2000.

VIOLATION OF CIVIL RIGHTS OF PLAINTIFF PITTS

10-37. Plaintiff Pitts realleges and repeats paragraphs 1-37 and incorporate the same as if fully set forth therein.

38. The actions of the Defendants as alleged herein deprived and continue to deprive Plaintiff Michael Pitts of certain rights, privileges and immunities protected by the United States Constitution and the laws of the United States within the meaning of 42 U.S.C. Section 1983 in that the Defendants caused signs to be placed on the properties located at 319 S. Albert and 921 E. Merchant in the City of Kankakee publicly identifying Plaintiff as the owner of slum property, informing the public of the phone number of Plaintiff Pitts' business, Tri City Construction, and in notifying the public that Plaintiff is "in violation of the City Code and chooses not to bring the property into compliance thereby significantly contribution to the blight in this neighborhood"; in retaliation for Plaintiff's exercise of his 1st Amendment rights as above set forth, knowing that Plaintiff Pitts was not the owner of either property, knowing that the phone number listed on the sign was not the home phone number of the property owner but was in fact Plaintiff Pitts' business phone, and knowing that on August 16, 1999, the Kankakee City Council ordered the removal of the sign at 319 S. Albert.

39. The actions of the Defendants, and each of them, in violating the constitutional rights of the Plaintiff as above set forth was continuing violations up to April 7, 2000.

40. The acts above alleged were performed by the Defendants under Color of Law.

41. The actions of the Defendants were premeditated and malicious and done with the sole intent to embarrass, harass and humiliate the Plaintiff and retaliate against him for his exercise of his 1st Amendment rights as above set forth.

42. Defendant Green as Mayor and Bohlen as Corporation Counsel, as agents of the City of Kankakee, were individuals with final policy making authority 'for the Defendant City of Kankakee with respect to the slum landlord signs erected on the properties identifying the Plaintiff as the owner thereof as above-described and that therefore each of them and the City of Kankakee violated the Plaintiff's Constitutional Rights under the 1st and 14th Amendments of the Constitution of the United States and 42 U.S.C. Section 1983.

43. The Plaintiff Pitts has suffered mental anguish, emotional distress, embarrassment, harassment, deliberate interference with his 1st Amendment Rights, public humiliation and disgrace and loss of income and business, all because of the Defendants' retaliation against Plaintiff for Plaintiff's exercise of his 1st Amendment Rights as guaranteed by the Constitution of the United States.

WHEREFORE, Plaintiff Pitts prays for the following relief:

For the entry of a judgment in his favor and against Defendants, City, of Kankakee, Donald E. Green, individually and as Agent of the City of Kankakee; and Christopher Bohlen, individually and as Agent of the City of Kankakee, in the amount of One Hundred Fifty Thousand Dollars ($150,000.00) compensatory damages and against Defendants Green and Bohlen individually in the amount of Two Hundred Fifty Thousand Dollars ($250,000.00) punitive damages plus Plaintiff's reasonable attorney's fees pursuant to 42 U.S.C. Section 1988; his Costs of suit and for such other and further relief as the Court deems just.

COUNT II

44. Plaintiff, Charles Lawson, for his Complaint against the Defendants states as follows:

45. Plaintiff, Charles Lawson, was, at all times pertinent hereto, Vice-President of the Kankakee Landlords' Association.

46. In February, March and April of 1993 Plaintiff Lawson publicly supported and campaigned for the election of the Democratic Candidate for Mayor of the City of Kankakee who was opposing the then Republican Candidate, Donald Green.

47. Donald Green was elected Mayor of the City of Kankakee at the April, 1993 election.

48. Defendant Bohlen publicly supported and campaigned for Green in the 1993 election and was a member of Green's Campaign Committee.

49. Defendant Bohlen was appointed by Green when Mayor to the position of Assistant Corporation Counsel of the City of Kankakee in 1993, and became Corporation Counsel in April, 1997.

50. In March of 1994 Defendant Bohlen was elected Vice-Chairman of the Kankakee County Republican Central Committee.

51. On or about February 23, 1997, and through April 1, 1997, Plaintiff Lawson, publicly supported and campaigned for the Democratic opponent running for Mayor against Defendant Donald Green who was running for re—election to the position of Mayor of the City of Kankakee.

52. Defendant Bohlen publicly supported and campaigned for Green during the 1997 Mayoral campaign.

53. On or about February 11, 1997, the Kankakee Landlords' Association held a public forum and invited all Republican and Democratic candidates for Mayor of the City of Kankakee.

54. At said forum Defendant Donald Green as a candidate did not appear.

55. Defendant Bohlen attended said February 11, 1997 forum and demanded to participate on behalf of candidate Donald Green.

56. Plaintiff Lawson, as Vice-President of the Kankakee Landlords' Association, refused to allow Defendant Bohlen to participate on behalf of Green and Bohlen became publicly agitated and upset at the refusal of Plaintiff to allow him to participate and speak on behalf of Green.

57. Defendant Green was re-elected as Mayor of the City of Kankakee at the April, 1997 election.

58. From 1994 to the present, individually and on behalf of the Kankakee Landlords' Association, Plaintiff Lawson, as an officer of said organization, publicly criticized, argued with and opposed efforts by the Defendant, City of Kankakee, and Defendants Green and Bohlen regarding City of Kankakee's landlord's licensing ordinance; the policy of the City of illegally suing landlords personally for their tenants municipal utility charges; the illegal actions of employees of the City's Code Enforcement Department directed at landlords and their properties; and the decision of Defendants Green and Bohlen to place slum property signs on certain rental properties within the City of Kankakee.

59. Sometime prior to June of 1997, Defendants Green and Bohlen, without approval of the Kankakee City Council and without
authority under Illinois Law or City of Kankakee Ordinance, developed a plan to place 3' x 5' signs on the property of people who owned rental properties within the City of Kankakee.

60. Defendant Green stated the signs would list the property owner's name, address and home telephone number and that this sign would also state the owner was in

violation of the City Code.

61. On or about June 10, 1997, Plaintiff Charles Lawson, as Vice—President of the Kankakee Landlords' Association, at a public meeting of said Association, criticized Defendants' sign program and stated, as reported in the June 11, 1997 edition of the *Daily Journal*, Kankakee County's only daily newspaper, that "this (the signs) is just a bunch of crap".

62. On or about June 13, 1997 Defendant Green directed the erection of a 3' x 5' sign on the property owned by the Plaintiff Charles Lawson located at 442 S. Chicago Avenue, Kankakee, Illinois, which sign stated:

SLUM PROPERTY!
THE OWNER OF THIS PROPERTY:
CHARLES LAWSON
P.O. BOX 317, CLIFTON, IL
694—3721
IS IN VIOLATION OF CITY CODE
AND CHOOSES NOT TO BRING
THE PROPERTY INTO
COMPLIANCE THEREBY
SIGNIFICANTLY CONTRIBUTING
TO THE BLIGHT IN THIS
NEIGHBORHOOD

63. On or about October 27, 1999, Plaintiff Lawson sold and conveyed the 412 S. Chicago Avenue property to Neighborhood Partners
of Kankakee, Inc. by warranty deed recorded at the Kankakee County Recorder of Deeds office on October 28, 1999.

61. Neighborhood Partners of Kankakee, Inc. is an Illinois not for profit Corporation and receives annual grants from the City of Kankakee.

65. Neighborhood Partners of Kankakee, Inc. had, at all times pertinent hereto, the following City of Kankakee

officials or employees on its Board of Directors: Michael Kinkade, Kankakee Police Officer; JoAnne Schwade, Alderperson for the 2nd Ward of the City of Kankakee (within which Ward 442 5. Chicago Avenue is located); and Jan Bond, head of the City of Kankakee Code Enforcement Department.

66. Neighborhood Partners of Kankakee, Inc. had at all times pertinent hereto Dennis Baron as its attorney. Baron is a 6th Ward Alderman for the City of Kankakee and has been since April, 1987.

67. From and after October 27, 1999 to December 3, 1999 Defendants permitted the sign as described in paragraph 62 to remain at 442 S. Chicago Avenue with Plaintiff Lawson's name, address and phone number thereon knowing Plaintiff Lawson was not the owner of the property during this time.

68. From and after October 27, 1999 through the date of the filing of this Amended Complaint, no work or repairs of any kind have taken place at 442 S. Chicago Avenue and no sign has erected by Defendants on said property publicly identifying Neighborhood Partners of Kankakee, Inc. as the owner of slum property located at 442 S. Chicago Avenue in the City of Kankakee.

VIOLATION OF CIVIL RIGHTS OF PLAINTIFF LAWSON

45-68. Plaintiff Lawson realleges and repeats paragraphs 45-68 and incorporates the same as if fully set forth therein.

69. The actions of the Defendants as hereinabove alleged, deprived and continue to deprive the Plaintiff Lawson of certain rights, privileges or immunities protected by the United States Constitution and the laws of the United States within the meaning of 42 U.S.C. Section 1983 in that Defendants placed a sign on property when owned by Plaintiff Lawson in retaliation for Lawson's exercise of his 1st Amendment rights and Defendants did, and have, and

continue to further retaliate against Plaintiff Lawson for the exercise of his 1st Amendment rights by deliberately allowing said sign to remain at 442 S. Chicago Avenue identifying Plaintiff Lawson as the owner of slum property and publicly informing people that Lawson is in violation of the City Code and that Lawson "chooses not to bring the property into compliance thereby significantly contributing to the blight in this neighborhood" even though Lawson had conveyed the property as of October 27, 1999, to Neighborhood Partners of Kankakee, Inc., and by not erecting a sign from and after October 27, 1999 at 442 S. Chicago Avenue informing the public that Neighborhood Partners of Kankakee, Inc. owned slum property.

70. The actions of the Defendants, in violating the Constitutional rights of the Plaintiff Lawson as above set forth, are continuing violations up to and including the date of the filing of this Complaint.

71. The acts above alleged were performed by the Defendants under Color of Law.

72. The actions of the Defendants were premeditated and malicious and done with the sole intent to embarrass, harass and humiliate the Plaintiff and retaliate against him for his exercise of his 1st Amendment rights as above set forth.

73. Defendant Green as Mayor and Bohlen as Corporation Counsel, as agents of the City of Kankakee, were individuals with final policy making authority for the Defendant City of Kankakee with respect to the slum landlord signs erected on the properties identifying the Plaintiff as the owner thereof as above-described and that therefore they and the City of Kankakee violated the Plaintiff's Constitution Rights under the 15t and 14th Amendments of the Constitution of the United States and 12 U.S.C. Section 1983.

74. The Plaintiff Lawson has suffered mental anguish, emotion distress, embarrassment, harassment, deliberate interference with his 1st Amendment rights, public humiliation and disgrace all because of the Defendants' retaliation against Plaintiff's exercise of his 1st Amendment rights as guaranteed by the Constitution of the United States.

WHEREFORE, Plaintiff Lawson prays as follows:

For the entry of a judgment in his favor and against Defendants City of Kankakee, Donald Green, individually and as Agent of the City of Kankakee, and Christopher Bohlen, individually and as Agent of the City of Kankakee, in the amount of Twenty-five Thousand Dollars ($25,000.00) compensatory damages and against Defendants Green and Bohlen individually in the amount of Two Hundred Fifth Thousand Dollars ($250,000.00) punitive damages plus Plaintiff's reasonable attorney's tees pursuant to 42 U.S.C. Section 1968; his costs of suit and for such other and further relief as the Court deems just.

Michael Pitts, Plaintiff
Charles Lawson, Plaintiff
Charles E. Ruch, Jr. Their attorney

Charles E. Ruch, Jr.
Attorney at Law
Req. No. 2415917
1440 W. Court
Kankakee, IL 60901
(815) 933-3330

EXHIBITS

(All Exhibits as attached to the original Complaint are incorporated by reference herein)

KANKAKEE FIRE DEPT. DIVISION OF CODE ENFORCEMENT
165 NORTH SCHUTLER AVENUE
KANKAKEE ILLINOIS 60901
(815) 936-7390

Exterior Violations/Compliance Weather Permitting

01/15/97

MIKE PITTS
ONE RIVER LANE
KANKAKEE, ILLINOIS 60901

RE: INSPECTION OF 319 S. ALBERT BLVD 1 ON 01/10/97

Your area of the City was recently reviewed as part of an on-going patrol program conducted by the Code Enforcement Division. This effort is intended to improve our communities and assure property owners *that* their neighborhoods will not be allowed to deteriorate. During the course of our most recent patrol, your property, located at the above noted address, was inspected and found to be in violation of the Property Maintenance Codes listed on the following page.

We are aware that weather may not permit the correction of the exterior violations right away. For this reason a reinspection of the exterior of this property will not occur until July, 1997. We do expect the violations to have been corrected by this time. If work to correct the violations cannot be completed by July, please contact the Code Enforcement Officer whose name appears below at 936-7390 to discuss your situation. If you are not the current owner of this property, please let us know who the responsible party is

and how that person can be reached.

Your cooperation in correcting the listed violations is appreciated.

Sincerely,
Frank Ferro, Senior Code Officer Division of Code Enforcement
CC: Property File

Ronald Coash
Code Enforcement Officer

PROPERTY CODE VIOLATION REPORT:
CASE #: 17-O4-117-007
THE FOLLOWING CODE DEFICIENCIES MUST BE
CORRECTED WITHIN THE TIME (S) SHOWN:

CORRECT VIOLATIONS WITHIN 180 DAYS.

CODE: 1112
ENFORCEMENT REFERENCE
MULTI - PURPOSE ENTRY:
REPAIR FRONT PORCH.

CODE: 2207
ENFORCEMENT REFERENCE: PM 304.4, PM 304.5
REPAIR OR REPLACE ALL LOOSE, DAMAGED,
ROTTED, OR MISSING SIDING MATERIALS TO MATCH
EXISTING SIDING.
REPAIR SIDING.

CODE: 2501
ENFORCEMENT REFERENCES PM 304.4, PM 304.7
REPAIR OR REPLACE ALL ROTTED, DAMAGED. OR
MISSING WOOD ON THE
CORNICE, TO MATCH THE EXISTING CORNICE.
REPAIR SOFFIT AND FASCIA.

CODE: 2503
ENFORCEMENT REFERENCE: PM 304.4, PM 304.7
PREPARE AND PAINT THE CORNICE TRIM.
SCRAPE AND PAINT TRIM.

CODE: 2513
ENFORCEMENT REFERENCE: PM 304.6
REPLACE THE ROOF COVERING WHERE LEAKING
ROTTED, WORN, DAMAGED,
MISSING. OR OTHERWISE DETERIORATED.
REPAIR ROOF IN BACK.

CODE: 2915

ENFORCEMENT REFERENCE: Ord 91-26 sec 1(a)

No person shall permit weeds, grass or plants, other than trees bushes, flowers or other ornamental plants to grow to a height exceeding six (6) inches anywhere in the city; any such plants are hereby declared a nuisance.

TRIM SHRUBS IN RACK.

KANKAKEE FIRE DEPT. DIVISION
OF CODE ENFORCEMENT
165 NORTH SCHUYLER AVENUE
KANKAKEE, ILLINOIS 60901
(815) 936-7390

NOTICE OF PROPERTY MAINTENANCE INSPECTON

08/04/99

MIKE PITTS
ONE RIVER LANE
KANKAKEE, ILLINOIS 60901

RE: INSPECTION OF 319 S. ALBERT BLVD. ON *08/04/99*

On the date indicated on the reference line above the Division of Code Enforcement of the Kankakee Fire Department completed an inspection of the referenced property. Code violations were found to exist during the course of the inspection. In the interest of the health and safety of the Citizens of our great city, you are required by law to bring these code violations into compliance within the time frames given in the attached Property Code Violation Report. The time frames are assigned to the violations on the basis of their severity with respect to life-safety.

If, for some reason, you are unable to correct these conditions within the required time frame, please contact the Code Enforcement officer listed below to work out a compliance plan. We are willing to work out a reasonable plan to accomplish compliance within the context of your circumstances.

It will be necessary for you to contact the Code Enforcement officer named below as you complete the actions required to correct each of the violations. You may contact the officer at 936-7390, Monday through Friday, to schedu.le your follow-up inspections. Inspections may be conducted during the hours of 9:30 AM to 4:00 PM Monday through Friday.

Sincerely,

cc: Property File

Aaron Pool Code
Enforcement Officer

PROPERTY CODE VIOLATION REPORT:
CASE #: 17-04-117-007
THE FOLLOWING CODE DEFICIENCIES MUST BE CORRECTED WITHIN THE TIME(S) SHOWN:

CORRECT VIOLATIONS WITHIN 14 DAYS.:

CODE: 1112
ENFORCEMENT REFERENCE:
MULTI-PURPOUS ENTRY:
Current violations and any violations in the future must be corrected *before* the slum sign WILL be removed.

CODE: 2513
ENFORCEMENT REFERENCE: PM 304.6
REPLACE THE ROOF COVERING WHERE LEAKING, ROTTED, WORN, DAMAGED, MISSING, OR OTHERWISE DETERIORATED.
Front porch and back addition must be completed and approved by Building Inspector.

CODE; 2802
ENFORCEMENT REFERENCE: PM 304.9
REPAIR ALL CHIMNEYS WHERE CRACKED, • BROKEN, OR OTHERWISE DAMAGED.

CODE: 2804
ENFORCEMENT REFERENCE: PM 304.9
REPOINT MORTAR JOINTS IN EVERY CHIMNEY WHERE MORTAR IS LOOSE, CRACKED. OR MISSING.

CODE: 2920
ENFORCEMENT REFERENCE: PM 303.7
MAINTAIN THE GARAGE/OUTBUILDING IN GOOD REPAIR.

CODE: 2924
ENFORCEMENT REFERENCE: PM 393.5 PM 307
MAINTAIN THE EXTERIOR PREMISES FREE OF ANY ACCUMULATIONS OR ITEMS WHICH WOULD

ENCOURAGE THE INFESTATION OP RATS, VERMIN, INSECTS, RODENTS, AND OTHER PESTS.

Concrete and debris must be removed.

Supreme Court, U.S.
FILED
MAY 3 2002
OFFICE OF THE CLERK

No. 01-1129

In the

Supreme Court of the United States

MICHAEL PITTS and CHARLES LAWSON,

Petitioners,

v.

CITY OF KANKAKEE, an Illinois Municipal Corporation, DONALD GREEN, individually and as agent of the City of Kankakee, and CHRISTOPHER BOHLEN, individually and as agent of the City of Kankakee,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1) May a property owner recover damages which result from the discrete act of placing a "slum property" sign upon the property in retaliation for the exercise of rights protected by the First Amendment, conduct which the owner believes to be actionable, and recovery for which would otherwise be time-barred by the statute of limitations, by relying upon a continuing violation concept?

2) Is the refusal of city officials to undo their prior illegal act, specifically, to remove the slum property sign which they had previously posted on the property, after being ordered to do so by the city council, a "fresh act" which will permit the property owner to obtain relief for the original posting of the slum sign which occurred outside the statute of limitations?

3) Is the failure of city officials to remove the slum property sign after the property was sold, coupled with the failure to place a slum property sign on that property identifying the new owner, a "fresh act" which permits the property owner to obtain damages for the original illegal act of posting the "slum sign"?

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STATEMENT OF THE CASE

In its opinion below, the Court of Appeals for the Seventh Circuit accurately and succinctly set forth the facts necessary for the determination of the issues in this case. For the sake of brevity, the respondents incorporate, by reference, that recitation of the facts. (Appendix to Petition, pp. 2a-3a.)

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE COURT OF APPEALS CORRECTLY APPLIED CONTROLLING PRECEDENT.

For claims seeking recovery of damages under 42 U.S.C. §1983, the courts are to apply the same statute of limitations that would be applied to state actions for personal injuries. *Wilson v. Garcia*, 471 U.S. 261 (1985). In Illinois, this is a two-year statute of limitations. *Johnson v. Supreme Court of Illinois*, 165 F.3d 1140, 1141 (7th Cir. 1999).

The two petitioners claim that in retaliation for exercising their free speech rights, signs were placed upon their property in June, 1997, at the direction of the mayor and city attorney, labeling their buildings as "SLUM PROPERTY". The petitioners believed, at the time, that the acts were retaliatory, yet did not pursue a claim until they filed this action more than two years later, on November 18, 1999.

As is apparent from the first question presented for review identified by the petitioners and the arguments set forth in Part IA of their petition, it is the position of the petitioners that their claims for damages arising out

of the acts of posting the signs are not subject to a period of limitations because, they argue, the injury is continuing. This view is inconsistent with the principle of repose which underlies statutes of limitations. The city officials took discrete action and the petitioners believed, at that time, that they were the victims of retaliation. Their claims for injury flowing from that act accrued at that time. The Court of Appeals for the Seventh Circuit, applying controlling precedent, correctly concluded that these claims are time-barred.

As observed by the court below, normally the statute commences to run at the time of injury, but the claim may accrue at a later date, for example, "when it 'would be unreasonable to expect the plaintiff to perceive offensive conduct' or when the earlier violation may be recognizable as actionable only in light of later events." *Pitts v. City of Kankakee*, 267 F.3d 592, 595 (7th Cir. 2001). The petitioners do not challenge the uniformity with which this principle has been applied by the courts nor do they claim to fall within one of the referred to exceptions. That the injury continues to flow from the prior act cannot carry the day for the petitioners for that is not the proper focus. "The emphasis is not upon the effects of earlier . . . decisions; rather, it 'is [upon] whether any present *violation* exists.'" *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980). That there may be present or lingering effects of prior illegal acts that "'perpetuates the consequences of forbidden discrimination . . .'" is insufficient to avoid the time bar. (*Id.*). "[T]he emphasis should not be placed on mere continuity; the critical question is whether any present violation exists." *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1997).

While the Court of Appeals recognized that drawing a line between what amounts to a "fresh act" of illegality

and the lingering effects of prior injury may not always be easy (267 F.3d at 596), the court found that the claim of the petitioners, for purposes of determining the time of accrual, was most analogous to a defamation claim. (267 F.3d at 596). When so viewed, under the "single publication rule," which has been promulgated by the Commissioners on Uniform State Laws, and which is contained in the Restatement, statutes and common law, the claim of the petitioners accrued when the signs were posted, and "[o]nly their effects lingered on until the signs were removed." (267 F.3d at 597).

Although the issue of when the claim accrued may be a question of federal law, it was appropriate for the Court of Appeals to refer to policy determinations made by state legislatures as "reflecting both 'reason' and 'experience.'" *Jaffee v. Redmond*, 518 U.S. 1, 13 (1996); *accord Moragne v. State's Marine Lines, Inc.*, 398 U.S. 375, 390 (1990).

The petition makes no reference to the defamation analogy drawn by the court below. Rather, the petitioners criticize the court for creating "unpled" facts of defamation injury. (Petition at p. 16). This demonstrates a basic misunderstanding of the reasoning of the court of appeals.

The court did not create some injury for purposes of reaching its conclusion, but rather drew an analogy between the *publication* of a defamatory statement and the *posting* of the sign for purposes of determining when the petitioners' cause of action for retaliation would accrue. Under the single publication rule, which has been applied to claims for defamation, the court concluded that the petitioners' claims accrued with the posting of the signs. The petitioners' criticism of the court for creating a defamation injury is totally lacking of merit.

According to the view of the petitioners, without regard to whether an anchoring act or fresh act of retaliation occurred within two years of the filing of their complaint, their right to seek damages for the posting of the signs was not barred and could have even been maintained twenty-seven years later. Where it was apparent that they were the victims of retaliation, their claim for damages flowing from the act of posting the sign accrued at that time. The conclusion of the Court of Appeals that the mere presence of the signs did not amount to a fresh or illegal act was correct. As addressed more fully below, the Court of Appeals did not conclude that claims of retaliation based upon speech are to be treated any differently than claims of retaliation based upon religion.

II.

THE COURT OF APPEALS DID NOT CONCLUDE THAT PERSONS WHO ARE THE VICTIMS OF RETALIATION FOR ENGAGING IN PROTECTED SPEECH ARE ENTITLED TO LESS CONSTITUTIONAL PROTECTION THAN PERSONS WHO ARE THE VICTIMS OF RETALIATION BECAUSE OF THEIR RELIGIOUS PRACTICES.

The principle argument advanced by the petitioners that this action should be reviewed by this Court is their belief that this case should be controlled by a district court opinion in *Gonzales v. North Township of Lake County*, 800 F.Supp. 676 (N.D. Ind. 1992), and that in its effort to distinguish that opinion from the case before this Court, the Court of Appeals concluded that the Free Speech Clause is less deserving of constitutional protection than the Establishment Clause. (Petition at p. 9). As relevant to the retaliation claims before this Court, the Court of Appeals did not reach that conclusion, nor does the opinion have that precedential effect.

Neither the district court opinion in *Gonzales* nor the reversal of that decision by the Court of Appeals for the Seventh Circuit in *Gonzales v. North Township of Lake County*, 4 F.3d 1412 (7th Cir. 1993) have any precedential value as it relates to the issues in this case. In *Gonzales*, a town had erected a religious display upon its property and had continued to maintain it for twenty-seven years prior to a citizen filing a complaint for damages and injunctive relief against the town. While the district court did address the continuous violation argument advanced by the plaintiff, its discussion was dicta since the case was decided on the basis that the First Amendment was not violated by the religious display. The Court of Appeals reversed concluding that a claim was stated under the establishment clause.

Rather than simply dismiss the opinion of the district court as not having any binding, precedential value, the Court of Appeals, in this case, concluded that the Establishment Clause claim in that case was different because the constitutional violation "may not be obvious." (267 F.3d at 596). The petitioners maintain that the only difference between *Gonzales* and the case at bar is that the "sign" in *Gonzales* "contained a religious message and the Petitioner's sign didn't." (Petition at p. 9). However, there is a significant difference, one that ties in to the observation of the Court of Appeals that the constitutional violation may not be "obvious."

The claim of the petitioners involves a claim of retaliation specifically directed at them. The claim was obvious to them and their claim accrued at that time. Since the religious display was not directed at any particular person, the claim was not, in the view of the Court of Appeals, obvious to the plaintiff. Not being an obvious violation of the Establishment Clause, it could not be deter-

mined when that claim accrued. By no stretch can the decision of the Court of Appeals be construed as concluding that a different result would have been reached if the petitioners were the victims of retaliation for their religious practices rather than for their speech activity.

Moreover, while the issue of whether the continued presence of a religious display may not only be the subject of injunctive relief, but may also, through a continuing violation theory, permit the maintenance of a damages claim by the citizen of a town or by all of the citizens of a town may be the subject of scholarly debate, that issue, without any factual detail, cannot be resolved in the case before this Court. This case is about one discrete act of retaliation which the petitioners believed was unconstitutional.

III.

WHETHER THERE IS ANY DIFFERENCE IN THE APPLICATION OF THE CONTINUING VIOLATION THEORY IN THE FIRST AMENDMENT CONTEXT RATHER THAN IN AN EMPLOYMENT DISCRIMINATION CLAIM IS NOT AN ISSUE BEFORE THIS COURT NOR IS THE LAW ON THAT ISSUE UNCLEAR OR CONFUSING.

The petitioners observe that this Court has granted a writ of certiorari in *Morgan v. National Rd. Passenger Corp.*, 232 F.3d 1008 (9th Cir. 2000), *cert. granted* 523 U.S. 927 (2001). (Petition at pp. 9-10). The petitioners apparently suggest that this should be a companion case, but the issues involved are substantially different. *Morgan* involves a lengthy pattern and practice of racially motivated discipline and counseling, as well as a racially hostile environment claim arising out of a pattern and practice of ongoing and persistent harassment.

The question identified in that petition is whether employees may sue on "time-barred claims whenever incidents within the limitations period are 'sufficiently related' to the otherwise time-barred claims." (*Id.*). No similar issue has been identified by the petitioners. The Seventh Circuit has expressly refused to adopt the view of the Ninth Circuit in *Morgan* and continues to adhere to its prior precedent as well as the majority view. *Paul v. Bodine Elec. Co.*, 276 F.3d 345, 354 (7th Cir. 2002). The fact that certiorari has been granted in *Morgan*, an unrelated case dealing with a different issue, cannot be advanced as a basis for review by this Court.

As a basis for asserting that the case law is unclear and confusing, the petitioners refer to the same case law which was cited to the courts below in support of their position that the claim was not time barred. All of the authorities are distinguishable on their face and, in fact, other than *Gonzales,* none were deemed by the Court of Appeals to be worthy of discussion.

For example, *Williams v. Owens-Illinois, Inc.*, 765 F.2d 918, 924-25 (9th Cir. 1980), involved a nonpromotion claim. In *Kelly v. Metropolitan County Board of Education of Nashville*, 836 F.2d 986 (6th Cir. 1987), a county sought to enjoin the state from refusing to participate in desegregation, a dispute between a local public entity and a state, which was resolved on Eleventh Amendment immunity. *LRL Prop v. Portage Metro Housing Authority*, 55 F.3d 1097 (6th Cir. 1995), involved a property owner's claim of discrimination in enforcing building standards, and the court held that those claims were not time barred because the land owners had actual knowledge of the illegal acts. "Systematic violations" (Petition at p. 11) are not involved in this case, so whatever confusion may exist in that area, if at all, is of no import.

The Court of Appeals did not conclude that the law was confusing or unclear, but simply opined that drawing the line may not be easy. The decision was rendered without dissent, and no judge of the Seventh Circuit felt the issue to be worthy of rehearing.

Petitioner's rhetoric that that the law is unclear and confusing and citation to inapplicable and unrelated case law does not demonstrate any confusion on the precise issue before this court.

IV.

THE ACCRUAL OF A CAUSE OF ACTION AND THE BASIS FOR STATING A CLAIM AGAINST A PUBLIC ENTITY ARE UNRELATED CONCEPTS THAT HAVE NO BEARING ON THE ISSUES.

In Part IC, the petitioners confuse the concept of municipal liability under 42 U.S.C. §1983 with the issue of when a claim accrues. A municipality may be subject to liability under 42 U.S.C. §1983 only when some official custom, policy or practice is the moving force behind a constitutional violation. *See e.g., City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988). The discussion of the Court of Appeals for the Seventh Circuit contains no mention of the issue of public entity liability. There cannot be any confusion or inconsistency between two wholly unrelated concepts.

V.

THE COURT OF APPEALS PROPERLY DETERMINED THAT THE CONTINUED PRESENCE OF THE SLUM PROPERTY SIGNS DID NOT CONSTITUTE A CONTINUING VIOLATION AND PROPERLY DETERMINED THAT THE FAILURE TO REMOVE THE SIGNS WAS NOT A FRESH ACT OF DISCRIMINATION.

In Part II, the petitioners essentially rehash their prior arguments, most of which have been addressed above.

Relying upon its prior precedent, the court held that the failure of the individual defendants to obey the command of the city council to remove the signs "is not a 'fresh act' of discrimination (or here, retaliation), but instead is a persisting effect of past discrimination that does not effect the running of the statute of limitations." (267 F.3d at 596). It is submitted that the decision of the Court of Appeals for the Seventh Circuit is a correct statement of the law, and not the decision of the district court in *Ferner v. Village of Sheffield*, 656 F.Supp. 1017, (N.D. Ohio 1987), relied upon by the petitioners. There is no support for the position of the petitioners that the failure to act, albeit in response to the command of the city council, is a fresh act. A "failure" to act cannot be "an act."

CONCLUSION

For the reasons set forth above, the respondents request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 01-1129

In the

Supreme Court of the United States

MICHAEL PITTS and CHARLES LAWSON,

Petitioners,

v.

CITY OF KANKAKEE, an Illinois Municipal Corporation, DONALD E. GREEN, Individually and as Agent of the City of Kankakee, and CHRISTOPHER BOHLEN, Individually and as Agent of the City of Kankakee,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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Morange v. States Marine Lines, Inc.,
398 U.S. 375 (1970) 1

Pitts & Lawson v. City of Kankakee,
267 F.3d 592 (7th Cir. 2001) 1

REPLY

The Respondents' Brief failed to address any of the four questions presented in the Petition for Writ of Certiorari.

The common theme encompassed in all four of Petitioners' questions involved what standards should be applied to Complaints alleging a continuing violation of Plaintiffs' 1st Amendment rights as to when the statute of limitations began and expired.

The Respondents' failure to rebut Petitioners' arguments that other Circuits would not have found Petitioners' Complaint time barred consistent with their decisions in 42 U.S.C. §1983 continuing violation cases and Respondents' failure to address the issue that other Circuits use different criteria for determining when the statute of limitations begins and ends in employment discrimination cases alleging a continuing violation is the most compelling reason the Court should grant the Petition.

The Respondents cite *Jaffee, Special Administrator v. Redmond*, 518 U.S. 1 (1996). This was a wrongful death case—not a continuing violation case and has no relevance to any of the issues framed within the Petition for Writ of Certiorari.

The Respondents also cite *Morange v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). This is a wrongful death case involving maritime law and has nothing to do with a continuing violation either in a 1st Amendment or employment discrimination context and is totally irrelevant to any issue before the Court.

With the exception of *Pitts v. City of Kankakee*, 267 F.3d 592 (7th Cir. 2001); and *Ferner v. Village of Sheffield*, 656 F.Supp. 1017 (N.D. Ohio 1987), Respondents cite the Court nothing but employment discrimination

cases. Respondents made no argument to this Court that the statute of limitations criteria in an employment discrimination continuing violation case should be identical to those brought under 42 U.S.C. §1983. The reason is obvious. The cases from other Circuits in the 42 U.S.C. §1983 cases cited in the Petition for Writ of Certiorari hold to the contrary.

Respondents' use of *Ferner v. Sheffield*, supra; is disingenuous when read in light of their *Memorandum in Support of Their Motion to Dismiss Plaintiffs' Amended Complaint* in the U.S. District Court case. (Appendix 1-8; at p. 6).

Respondents' Memorandum admitted that if *Ferner*, supra; was the law in the 7th Circuit, Plaintiffs' Amended Complaint, alleging a continuing violation of their 1st Amendment rights would not be time barred.

Respondents' use of *Gonzales v. North Township of Lake County*, 800 F.Supp. 676 (N.D. Ind. 1992); "*Gonzales I*" and *Gonzales v. North Township of Lake County*, 4 F.3d 1412 (7th Cir. 1993); "*Gonzales II*" is also incorrect.

In *Gonzales I*, supra; the District Court held only one Plaintiff had standing to challenge a religious sign posted and maintained continuously for more than twenty-seven (27) years prior to the filing of his Complaint even though Plaintiff knew of the sign's existence more than two years before he filed suit.

In *Gonzales I*, supra; decision the Defendant's statute of limitations argument seeking to bar Plaintiff's claim failed because as the U.S. District Court said:

> "The day a cause of action accrues is a Federal question even though a State statute of limitations is utilized . . . Appleman alleges a continu-

> ing violation of the 1st Amendment as each day there is a violation, each day's cause of action accrues. . .", at p. 684.

However, the U.S. District Court held the religious sign was secular and did not violate Appleman's 1st Amendment rights. All the Plaintiffs in *Gonzales I* appealed; Appleman as to the District Court's ruling the sign was secular and the remaining Plaintiffs as to the District Court's ruling denying them standing.

The 7th Circuit Court of Appeals reversed the District Court decision, holding that all the Plaintiffs had standing; and the sign did violate the 1st Amendment rights of each of the Plaintiffs. The issue of standing which carries with it the requirement the Plaintiff suffers an actionable injury is at the core of Respondents' misuse of the *Gonzalez* cases.

The 7th Circuit's decision in *Gonzales II* held each Plaintiff alleged a continuing violation injury resulting from the religious sign, and because the religious sign was still up, even though some of the Plaintiffs knew of the existence of the religious sign more than two years before they filed their Complaint, the continuous posting of the religious sign was a continuing violation of Plaintiffs' 1st Amendment rights and therefore, not barred by the statute of limitations.

The religious sign was put up only one time some twenty-seven (27) years before the Plaintiffs in the *Gonzalez* cases filed suit. Similarly, the "slum signs" complained of by Petitioners were put up only one time. The 7th Circuit's decision reversing and granting each and every one of the Plaintiffs all of their relief in *Gonzalez II* leads to the conclusion that each day the "slum signs" remained publicly posted in retaliation for Petitioners' exercise of

their Constitutional rights, a new violation of their 1st Amendment rights was inflicted on them and the statute of limitations did not begin to run while the violation of either Petitioner's rights or Plaintiffs' rights in the *Gonzalez* cases continued to be inflicted on them.

The 7th Circuit's opinion in *Gonzalez II*, built upon the religious sign's continuous placement giving specific individuals standing to sue for a violation of their 1st Amendment rights as a continuous violation is legally indistinguishable from Petitioners' injuries.

It is true Petitioners' claims involved an unconstitutional retaliation directed only at them. It is also true the religious sign was not intended to unconstitutionally injure any identifiable individual. However, that is irrelevant because standing carries with it the necessary prerequisite that an individual suffer an actionable injury as a result of State action, which includes situations where the injury results from a failure to act.

The fact other persons may not have felt injured and chose not to legally complain about the unconstitutional religious sign is irrelevant. The Plaintiffs in *Gonzalez II* had the requisite standing because each of them suffered an actionable harm. Their harm gave each of them standing to sue based on a continuing violation of each of their 1st Amendment rights. There is no difference with the standing and injury of the Plaintiffs in *Gonzalez II* and the standing and injury of the Petitioners in this case, and Respondents cite the Court no authority to the contrary.

The fresh acts of retaliation by the Respondents against the Petitioners resulted in a further Constitutional injury by their failure to act. Petitioners' authority on this issue was met with silence in Respondents' Brief.

Respondents' misuse of *Ferner*, supra; and their superficial assertions regarding the persisting effect of past discrimination may be the law in determining when the statute of limitations runs in employment discrimination cases, but it is not dispositive in 1st Amendment continuing violation cases.

Respondents did not address the law cited within Petitioners' Petition for Writ of Certiorari establishing with legal authority that there is a different standard when continuing violation involving 1st Amendment rights is time barred.

As *Ferner*, supra; held, when a person alleges a continuing violation of his 1st Amendment rights, the issue is not when the Plaintiff should have known that he or she was being retaliated against but, as in *Ferner*, supra; if a fresh act of retaliation occurred within the statute of limitations the Plaintiff's damages for time barred acts are recoverable if an act, which includes a "failure to act" occurs within the statute of limitations, *Ferner v. Sheffield*, supra.

Petitioners' reliance on "fresh acts" is in the alternative to their reliance on the continuous posting of the sign as a continuing violation of their 1st Amendment rights. Respondents did not address either one of these issues in the context of Questions posed within Petitioners' Writ.

The Respondents' Brief in Opposition is a series of admissions through their failure to cite the case law on the questions and issues presented. The Respondents' misuse of the *Gonzalez* cases and their concluding incomprehensible statement that: "A failure to act cannot be an act", stands unsupported by any authority.

Petitioners' cases established the conflict among Circuits. Respondents presented no coherent argument sup-

ported by authority and their final sentence falls freely, unsupported by any precedential parachute.

CONCLUSION

For the foregoing reasons Petitioners submit that the Court, having ordered Respondents to provide it with competent authority and Respondents having failed to do so in support of their position, Petitioners submit that their Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA/DANVILLE DIVISION

MICHAEL PITTS, and CHARLES LAWSON,	)	
Plaintiffs,	)	
vs.	)	No. 99-2281
	)	**JURY TRIAL DEMANDED**
CITY OF KANKAKEE, ILLINOIS, an Illinois Municipal Corporation; DONALD E. GREEN, Individually and as AGENT OF THE CITY OF KANKAKEE; and CHRISTOPHER BOHLEN, Individually and as AGENT OF THE CITY OF KANKAKEE,	)	
Defendants.	)	

MEMORANDUM OF DEFENDANTS IN SUPPORT OF THEIR MOTION TO DISMISS THE AMENDED COMPLAINT

The Defendants have moved to dismiss the Amended Complaint on the basis that the Plaintiffs' claims of retaliation accrued in June, 1997, when their property was "posted" by the Defendants, and the refusal of the Defendants to remove the signs does not amount to a continuing violation. This claim was filed more than two years after the claims accrued and is barred by the applicable limitations period.

ALLEGATIONS OF AMENDED COMPLAINT

The Plaintiffs are officers of the Kankakee Landlords Association (Amended Complaint, Count I, ¶10; Count II, ¶45), and from 1994 to the present, publicly criticized the Defendants' enforcement and application of the CITY OF KANKAKEE's licensing ordinance and the enforcement by the Defendants of the CITY's sign ordinance. (Count I, ¶23; Count II, ¶58). The Plaintiffs also supported Defendant GREEN's opponent in the mayoral elections in Spring, 1993 and Spring, 1997. (¶¶11, 16). In retaliation for the Plaintiffs engaging in their rights of free speech and free association, the Defendants are alleged to have retaliated against the Plaintiffs by "posting" certain property owned by the Plaintiffs and another parcel of property identified as being owned by Plaintiff PITTS as "slum property".

As to PITTS (Count I), in June, 1997, signs were placed on property at 319 Albert and 921 East Merchant, labeling the property as "slum property". Count I, ¶¶28-29). Although PITTS was identified as the owner and the telephone number of his business was listed on the sign, it is alleged that PITTS never owned this property. (Count I, ¶30). PITTS, inexplicably, repaired one of the properties for the owner (Count I, ¶33); and despite being ordered by the CITY Council, in August, 1999, to remove the sign at the 319 address, the Defendants refused to comply with that vote. (Count I, ¶¶36-37). It is also alleged that in August, 1999, PITTS was told that the sign at 319 would never by removed. (Count I, ¶35).

As to Plaintiff LAWSON (Count II), his property at 442 Chicago was posted in June, 1997 (Count II, ¶62); and despite the property being sold in October, 1999 to a non-profit organization that has CITY officials as employees or officers, the Defendants allowed the sign to continue

to remain on the property and never posted a sign identifying the new owners of the property. (Count II, ¶¶67-68).

ARGUMENT

The applicable statute of limitations for Section 1983 actions arising in Illinois is two years. *Johnson v. Supreme Court of Illinois*, 165 F.3d 1140, 1141 (7th Cir. 1999). This action was filed on November 18, 1999, and the acts of posting the property in June, 1997, clearly are barred by the applicable limitations period. The Plaintiffs, however, seek to avoid the two-year prescription by opining that the actions of the defendants are continuing violations, up to April 7, 2000 (Count I, ¶39), or the date of filing (Count II, ¶72) of the Plaintiffs' First Amendment rights. (Count I, ¶39; Count II, ¶48). The continuing violation doctrine has no application.

"The continuing violation doctrine allows a plaintiff to get relief for a time-barred act by linking it with an *act* that is within the limitations period. For purposes of the limitations period, courts treat such a combination as one continuous act that ends within the limitations period." *Garrison v. Burke*, 165 F.3d 565, 569 (7th Cir. 1999) (emphasis added). And when there has been a "two-year lull", the application of the continuing violation doctrine is precluded. (*Id.*, 165 F.3d at 570).

In this Circuit, the continuing violation doctrine has been applied only in three different circumstances:

> First, in the context of hiring and promotion decisions where the decision-making process takes place over a period of time and the limitations begins running when the employee knows that the decision has been made;

> Second, when there exists an express, openly espoused policy that is alleged to be discriminatory; and
>
> Third, where a covert practice of discrimination is followed over a period of time in such circumstances that a plaintiff can only realize that he is a victim of discrimination after a series of discreet acts and the period begins to run when the plaintiff gains such insight.

Jones v. Merchants Nat. Bk. & Trust Co., 42 F.3d 1054, 1058 (7th Cir. 1994).

Where a plaintiff knows, or with the exercise of reasonable diligence should know that a claim exists, the plaintiff must sue over that act within the period of limitations. (*Id*).

The first two exceptions clearly do not apply in the case at bar. And with respect to the third exception, a plaintiff may not base a suit on conduct that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, for example, if it could not be recognized as actionable only in light of later events. *Galloway v. General Motors Service Parts Operations*, 78 F.3d 1164, 1167 (7th Cir. 1996).

The Plaintiffs clearly were on notice of the Defendants' actions in June, 1997 and should have sued then. It is fundamental that in order for the continuing violation theory to apply, there must be an "anchoring" act that occurs within the limitations period. *Speer v. Rand McNally & Co.*, 123 F.3d 658, 664 (7th Cir. 1997); *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1528 (7th Cir. 1990). A refusal to undo a prior wrongful act is not a frest act of illegality. *Speer*, 123 F.3d at 664; *Graehling v.*

Village of Lomard, 58 F.3d 295, 297 (7th Cir. 1995). The failure to correct a violation of federal law is not, in itself, a violation of that law. *Librizzi v. Children's Memorial Medial Center*, 134 F.3d 1302, 1306 (7th Cir. 1998).

The following are examples of claims in which the Court has held that the continuing violation doctrine had no application, and that the damages were simply the "lingering" effect of an unlawful act. Pay differential which results from a non-promotion claim is not a continuing violation. *Dasqupta v. University of Wisc. Bd. of Regents*, 121 F.3d 1138 (7th Cir. 1997). Nor is being assigned low rungs on the seniority ladder which results in a later denial of promotion. *Huels v. Exxon Coal USA, Inc.*, 121 F.3d 1047 (7th Cir. 1997).

As noted above, no illegal act occurred within the limitations period, other than the failure of the Defendants to remedy the alleged retaliatory act of placing the sign in the first place. It is the burden of the Plaintiffs to present facts which would justify some equitable modification of the limitations period. *Hamilton v. Komatsu Dresser Ind., Inc.*, 964 F.3d 600 (7th Cir. 1992).

The Plaintiffs may claim that they fall within the second circumstance in which the continuing doctrine violation has been applied, that is, when there is a challenge to an express and openly espoused policy. But simply characterizing the allegations of the Complaint as such, does not make it so.

In *Selan v. Kiley*, 969 F.2d 560, 565 (7th Cir. 1990), the Seventh Circuit gave examples of this second exception—an "express, openly espoused policy of discrimination against older workers" (969 F.2d at 565) or "systemic" challenges to an entire promotional system or retirement policy. (969 F.2d at 565 n. 5). To fall within

this exception, there must be "an explicit, clearly conveyed policy", for example, of discriminating against blacks in promotion decisions. *Jones v. Merchants Nat. & Trust Co.*, 42 F.3d 1054, 1058 (7th Cir. 1994). No such policy is involved in this case.

"The continuing violation doctrine allows a plaintiff to get relief for a time-barred act by linking it with an act that is within the limitations period". *Selan v. Kiley*, 969 F.2d 560, 564 (7th Cir. 1992). Therefore, the critical inquiry is to determine whether there has been a "fresh act" of illegality. None of the cases previously relied upon by the Plaintiffs in responding to the prior Motion to Dismiss support their theory that the failure or refusal of the Defendants to remove the sign constituted a "fresh act".

In *Ferner v. Village of Shefield*, 656 F.Supp. 1017 (N.D. Ohio, 1987), the Court noted that there was a continuing violation because the plaintiff's hours were "drastically reduced since he exercised his free speech rights". The damage occurred each payroll period. And to the extent that this may support the position of the Plaintiffs, it is not law in this Circuit. The discriminatory application of pay schedules are not viewed as the lingering effect of a prior, unlawful act. *Dasqupta v. University of Wisconsin Board of Regents*, 121 F.3d 1138 (7th Cir. 1997) (Title VII and Section 1983 case).

Togba v. Cook County, 1999 LEXIS 18506 (N.D. Ill., 1999) is distinguishable since there the Court found that in view of "repeated assurances" that the plaintiff would receive a raise, the plaintiff did not recognize the existence of his claim. Similarly, in *Båker v. F & F Inv. Co.*, 489 F.2d 829 (7th Cir. 1993), the Court held that each installment payment under a contract was a separate and

distinct violation, where a racially discriminatory mortgage and finance program was at issue. *Hanover Shoe, Inc. v. United States Mach.*, 392 U.S. 481 (1968) also involved a lease. And *in Lickteig v. Landauer*, 1991 LEXIS 18307 (E.D. Pa., 1991), the Court commented that some illegal acts had occurred within the limitations period.

The "acts of retaliation" upon which the Plaintiffs rely all involve the failure or refusal of the Defendants to take down the signs. (Pl. Brf., p. 11). That the Defendants did not put up a sign at 422 after the Plaintiffs sold the property to neighborhood partners is again simply an allegation that the Defendants failed to ameliorate a prior, alleged unlawful act.

Respectfully submitted by,

/s/ William W. Kurnik

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys of record herein, hereby certifies that the original of the foregoing **REPLY MEMORANDUM OF DEFENDANTS IN SUPPORT OF THEIR MOTION TO DISMISS THE AMENDED COMPLAINT** was filed with the Clerk of the U.S. District Court for the Central District of Illinois; and a copy thereof was served upon the following, by depositing same in the U.S. mail, first-class postage prepaid this 10th day of May, 2000;

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